139-651

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1593.

J. W. DAVIS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

FILED JANUARY 22, 1891.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the court of appeals of the State of Texas *of Texas*, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in said court of appeals, before you, between J. W. Davis, who is appellant, and The State of Texas, who is appellee, No. 3329 on the docket of said court of appeals, sitting at Tyler, in said State, a manifest error hath happened, to the great damage of the said J. W. Davis, who is plaintiff in error herein, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done, and that the execution of said judgment be stayed until this writ of error is disposed of.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the thirty-first day of July, in the year of [SEAL.] our Lord one thousand eight hundred and ninety, and seal of our said circuit court at Austin, in the 114th year of the Independence of the United States.

D. H. HART,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin,
By GEO. F. JERNIGAN, *Deputy.*

Allowed by—
JOHN P. WHITE,
P. J. Court of Appeals of Texas.

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the United States circuit court in and for the western district of Texas and fifth circuit, at Austin, hereby certify that the above is a true and correct copy of the original writ of error issued this day by the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, under my test and seal of this court.

The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.

Witness my hand and official seal, at office, in the city of Austin, this the 31st day of July, A. D. 1890.

D. H. HART, *Clerk,*
By GEO. F. JERNIGAN, *Deputy.*

b [Endorsed:] In Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def'ts in error. Writ of error to Supreme Court of the United States. Issued 31st day of July, A. D. 1890. D. H. Hart, clerk of the circuit court of the United States, west. dist. of Texas, at Austin, by Geo. F. Jernigan, deputy.

[Endorsed:] I hereby certify that I, on this day, delivered to J. C. Richardson, the sheriff of Tarrant county, Texas, a certified copy of the original writ of error in the within-stated case, of which original writ this is also a certified copy. Witness my official signature this 28 day of Aug., 1890. Geo. A. Knight, U. S. marshal, N. D. of Texas, per W. J. McDonald, deputy. Forward E. P. Smith, clerk c't of appeals, Tyler, Tex. Filed in court of appeals, at Tyler, September 8th, 1890. E. P. Smith, cl'k.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the court of appeals of the State of Texas *of Texas*, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court of appeals, before you, between J. W. Davis, who is appellant, and The State of Texas, who is appellee, No. 3329 on the docket of said court of appeals, sitting at Tyler, in said State, a manifest error hath happened, to the great damage of the said J. W. Davis, who is plaintiff in error herein, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done, and that the execution of said judgment be stayed until this writ of error is disposed of.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the thirty-first day of July, in the year of our Lord one thousand eight hundred and ninety, and seal of our said circuit court at Austin, in the 114th year of the Independence of the United States.

The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.

D. H. HART,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin,
By GEO. F. JERNIGAN, *Deputy.*

Allowed by—
JOHN P. WHITE,
P. J. Court of Appeals of Texas.

d [Endorsed:] Orig. writ error. 3329. In Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def'ts in error. Writ of error to Supreme Court of the United States. Issued 31st day of July, A. D. 1890. D. H. Hart, clerk of the circuit court of the United States, west. dist. of Texas, at Austin, by Geo. F. Jernigan, deputy. Filed in court of appeals, at Tyler, August 4th, 1890. E. P. Smith, cl'k.

e UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the court of appeals of the State of Texas, holding session at Tyler, in said State, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said State court of appeals, before you, said cause being No. 3329 in said court of appeals, between J. W. Davis, who is appellant, and The State of Texas, who is appellee, in *in* said numbered cause on the docket of your said court of appeals of the State of Texas, sitting at Tyler, in said State, wherein was drawn in question the validity of a statute of the State of Texas and an authority exercised under the statutes of said State on the ground of their being repugnant to the Constitution and laws of the United States, and your decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and your decision was against the right and privilege specially set up and claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said J. W. Davis, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the fourth Monday of October, 1890, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the — day of October, in the year of our Lord one thousand eight hundred and ninety, and the seal of the circuit court of the United States, at Tyler, in the 114th year of the Independence of the United States.

[The Seal of the U. S. Circuit Court, Eastern Dist. Texas, Tyler.]

W. M. REED,
Clerk of the Circuit Court of the United States,
Eastern District of Texas, at Tyler.

Allowed.
JOHN P. WHITE,
Presiding Judge of the Court of Appeals of Texas.

This October 13th, 1890.

f [Endorsed:] No. 6866, 3329. In the Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Writ of error. Filed in court of appeals, at Tyler, Dec. 20, 1890. E. P. Smith, clerk. Original to go.

g UNITED STATES OF AMERICA:

To the State of Texas and L. S. Ross, Governor, and J. S. Hogg, attorney gen'l of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Texas, sitting at Tyler, wherein J. W. Davis is plaintiff and The State of Texas is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 31st day of July, in the year of our Lord one thousand eight hundred and ninety.

JOHN P. WHITE,
Presiding Judge Court of Appeals of Texas.

Test with seal of court, at Austin, this 31st day of July, A. D. 1890.

[The Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin,
By GEO. F. JERNIGAN, *Deputy.*

h [Endorsed:] Orig. citation. 6866, 3329. In Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def'ts in error, Citation in error. Issued 31st day of July, A. D. 1890. D. H. Hart, clerk of the circuit court of the United States, west. dist. of Texas, at Austin, by Geo. F. Jernigan, deputy. Filed in court of appeals, at Tyler, Dec. 20, 1890. E. P. Smith, clerk.

AUSTIN, TEXAS, *Sept. 11th*, 1890.

I hereby accept service of the within citation; waive copy and service of further process.

J. S. HOGG,
Att'y General of Texas.

i UNITED STATES OF AMERICA:

To the State of Texas and L. S. Ross, Governor, and J. S. Hogg, attorney general of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth Monday of October, 1890, pursuant to a writ of error filed in the clerk's office of the court of appeals of Texas, sitting at

Tyler, wherein J. W. Davis is plaintiff and you, The State of Texas, is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 13th day of October, in the year of our Lord one thousand eight hundred and ninety.

[Seal Court of Appeals of Texas.]

JOHN P. WHITE,
Presiding Judge of the Court of Appeals of Texas.

Test with seal of court, at Tyler, this 13th day of October, A. D. 1890.

[The Seal of the U. S. Circuit Court, Eastern Dist. Texas, Tyler.]

W. M. REED,
Clerk U. S. Circuit Court, Eastern Dist. Texas, at Tyler.

j [Endorsed:] 6866, 3329. In Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Citation in error. Filed in court of appeals, at Tyler, Dec. 20, 1890. E. P. Smith, clerk.

k UNITED STATES OF AMERICA:

To the State of Texas and L. S. Ross, Governor, and J. S. Hogg, attorney general of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth Monday of October, 1890, pursuant to a writ of error filed in the clerk's office of the court of appeals of Texas, sitting at Tyler, wherein J. W. Davis is plaintiff and The State of Texas is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 13th day of October, in the year of our Lord one thousand eight hundred and ninety.

[Seal Court of Appeals of Texas.]

JOHN P. WHITE,
Presiding Judge of the Court of Appeals of Texas.

Test with seal of court, at Tyler, this 13th day of October, A. D. 1890.

[The Seal of the U. S. Circuit Court, Eastern Dist. Texas, Tyler.]

W. M. REED,
Clerk U. S. Circuit Court, Eastern Dist. Texas, at Tyler.

l [Endorsed:] In Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Citation in error. Issued 13 day of Oct., A. D. 1890. Filed in court of appeals, at Tyler, Jan. 2d, 1891. E. P. Smith, clerk.

THE STATE OF TEXAS,
County of Travis.

I hereby waive service of the within citation and the second writ of error herein issued and accept service of same in behalf of The State of Texas, the defendant in error in said cause.

J. S. HOGG,
Attorney General of Texas, Attorney for State of Texas, Defendant in Error.

1 *Transcript to Court of Appeals of Texas.*

1st assignment.

J. W. DAVIS, Appellant,
vs.
THE STATE OF TEXAS, Appellee. } No. 3329.

From the district court of Tarrant county.

Applied for by appellant on the 30 day of Oct., 1889.

L. R. TAYLOR,
Clerk of the District Court of Tarrant Co.

Filed in court of appeals at Tyler the 29th day of Nov., 1889.

E. P. SMITH, *Clerk.*

Filed in court of appeals Apr. 24, 1890, at Austin, Texas.

P. WALTON, *Clerk.*

Caption.

THE STATE OF TEXAS,
County of Tarrant.

At a term of the district court begun and holden within and for the county of Tarrant, at Fort Worth, on the 9th day of September, A. D. 1889, and which said term of court has not yet adjourned, the Honorable R. E. Beckham, judge thereof, presiding, the following cause came on for trial, to wit:

5563. THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563.

2 *Presentation of Indictment.*

Report of grand jury (September 10, 1889).

And now comes the grand jury, a quorum being present, and return into open court the following bills of indictment, and, upon being interrogated by the court, say, each for themselves, that they concur in finding of said bills, viz:

THE STATE OF TEXAS
vs.
J. W. DAVIS, } No. 5563, Murder,

each of which bills is, by the judge presiding, in open court, handed to the clerk and ordered to be filed, and that such process thereon be issued as by law required.

Indictment.

In the name and by the authority of the State of Texas the grand jurors of the State of Texas, duly elected, tried, empanelled, sworn, and charged to inquire of offenses committed in Tarrant county, in the State of Texas, upon their oaths do present in and to the district court of said county that one J. W. Davis, in the county of Tarrant and State aforesaid, on the sixth day of July, in the year of our Lord one thousand eight hundred and eighty-nine, with force and arms, did, unlawfully and with his express malice aforethought, kill and murder one B. C. Evans with a pistol, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

T. H. ROE,
Foreman Grand Jury.

B. P. AYERS,
County Attorney.

(Endorsements on back of indictment:) No. 5563. Indictment. The State of Texas *vs.* J. W. Davis. Offense, murder. State witnesses: Press Hollingsworth, Bob Sandidge, Hugh Elliston. A true bill. T. H. Roe, foreman grand jury. Filed Sept. 10th, 1889. L. R. Taylor, district clerk Tarrant Co., Texas.

3 *Arraignment and Plea of Defendant* (*Sept. 16th*, 1889).

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. Arraignment of Defendant and Plea of Not Guilty, September 16th, 1889.

Now comes B. P. Ayers, county attorney, prosecuting the pleas of the State; also came the defendant in his own proper person and by attorney; whereupon the said defendant, J. W. Davis, was duly arraigned in open court, as required by law, and the indictment herein, wherein the said defendant, J. W. Davis, is charged with the offense of murder, was by the clerk of this court read to him, the said J. W. Davis, and he required to enter his plea in person to said indictment of guilty or not guilty; whereupon said defendant entered his plea of not guilty to said charge in said indictment.

Verdict and Judgment (*Oct. 12th*, 1889).

THE STATE OF TEXAS *vs.* J. W. DAVIS. } 5563. Verdict and Judgment, October 12th, 1889.

This day this cause was called for trial, and the State appeared by her county attorney and the defendant, J. W. Davis, appeared in person in open court, his counsel also being present, and the said defendant, J. W. Davis, having been duly arraigned and having pleaded not guilty to the indictment herein, both parties announced ready for trial, and thereupon a jury, to wit, J. H. Orr and eleven others, was duly elected, empanelled, and sworn, who, having heard the indictment read and the defendant's plea of not guilty thereto and heard the evidence submitted and having been duly charged by the court, retired in charge of the proper officer to consider of their verdict, and afterwards were brought into court by the proper officer, the defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the court and is here now entered upon the minutes of the court, to wit:

We, the jury, find the defendant guilty of murder in the first degree, and fix his punishment at death.

J. H. ORR, *Foreman.*

It is therefore considered and adjudged by the court that the defendant, J. W. Davis, is guilty of murder in the first degree, as found by the jury, and that he be punished as has been determined by the jury—that is, with death—and that he be remanded to jail to await the further orders of this court herein.

4 *Statement of Facts.* (*Filed Nov. 12th*, 1889).

Tarrant County District Court. September Term, 1889. (Tried Oct. 11, 1889.)

THE STATE OF TEXAS *vs.* J. W. DAVIS. } No. 5568.

A. N. Dawson.

A. N. DAWSON, called by the State and sworn, testified as follows:

I am acquainted with the B. C. Evans Co. building, in Fort Worth, and with what is called the carpet department and clothing department in said building. I have drawn a diagram of that building, which is now before me. I am an architect and am engaged in that business. This diagram

(Here follows diagram marked p. 4.)

represents the carpet and clothing department of the B. C. Evans Co. building, fronting on Main street. The carpet department is the north half of the building, and the clothing department is the south half. Main street runs north and south. The points of the compass are indicated on the diagram. The carpet department is 87 feet and 8½ inches long east and west and 23 feet 7 inches wide north and south. There is an opening through the wall between the carpet and clothing departments about two feet from the door on Main street. The opening is three feet wide. There is also another opening between the two departments 4 feet two inches wide, situated about 12 feet from the rear of the building. It is a two-story building, and there is a staircase going upstairs in the carpet department 7 feet 9½ inches from the partition wall and nearly opposite the rear opening. This is a diagram of the lower story of the building. In the northeast corner of the carpet department is a railing about three feet from floor, and one on floor with curtain suspended from top rail to floor, partitioning a little office in that corner. From the office there is a door leading out onto Main street. The building has what is called an iron front, consisting of iron posts with doors between them. Each department has three double doors—glass doors. The office railing is indicated in the diagram, and red curved lines, dotted, show the way the doors swing when they swing open. Double black lines represent the doors. In the north corner of the office is a safe; next east of that safe is a desk. There is also an iron safe in the southeast corner of the little office, against the south leaf of the double door leading to Main street. From the office to the rear end of the carpet department along the north wall are shelves, and a mark along the south wall of that department also indicates shelves. The diagram is drawn on a scale of one-half inch to a foot. The clothing department goes farther west than is indicated on the diagram.

Cross-examined by defendant's counsel:

The railing on the south side of the little office is straight. The diagram shows the exact location of the desk. It is 4 feet 6½ inches from the desk to the railing. It is five feet and one-half inches from the middle of the rail to the front door post. I have examined the location of the building. I went through and took these measurements. I saw what purported to be shot holes in the floor, outside of the railings. One is 15 inches from the rail and the other is about 18 inches. The two shot holes were about three inches apart. Dots indicate on the diagram the shot holes in the floor. From the farthest shot hole to the middle of the desk in the office is about 6 feet 8 inches. From the west end of the railing to the southwest corner of the desk is 5½ feet. North of the carpet department is another store, with a wall between. Against that wall in the office there is nothing but the desk and iron safe. The desk is three feet wide. The length of the enclosed office is ten feet two and one-half inches, and the width 7 feet 6½ inches.

Redirect examination by State's attorney:

It is three feet and about eight inches from the west end of the railing to the east end of the shelving. *To* the east end of the shelving is just opposite the west end of the railing. The railing extends about two feet eight inches farther west than the desk does. There was one bullet hole on the inside of the office, six inches from the center of the railing. I think the wall on the north side of the carpet department is a brick wall. It is plastered over. It is a masonry wall. There is a store building just north of the wall.

Dr. W. P. Burts.

Dr. W. P. BURTS, called by the State and sworn, testified:

I am a physician and surgeon. I was called to see B. C. Evans about the sixth of July of the present year. I think he was dead when I went in. I know the cause of his death. The cause
6 of his death was a pistol shot in the breast. It struck him in the left breast, about between the second and third rib, I think. I do not remember counting the ribs. It struck from the front, I think, from the record of the ball. There was also a shot in the back part of his head or just about the top of his head, ranging downwards. It went down some three or four inches, I suppose; went through the scalp and came out. I think the shot in front was the cause of his death. I don't remember what time of day it was that I saw Mr. Evans. It was after dinner, I think. He was at his store when I called to see him. When I got in he was sitting up—that is, they were holding him up. He was in the northeast part of the building. I think he was outside of the railing at that time. I did not notice how the ball entered his clothing in the breast wound. I noticed the wound. I ran my finger in. The wound ranged down, slanting down. B. C. Evans was a man in very good flesh, heavy set.

Q. Did you notice the range of the ball in the flesh before it got to the bone or not?

A. My recollection of the range of the ball—I ran my finger in the hole and ran it down. It ranged down.

Cross-examined by defendant's attorney:

Q. Did the ball strike any bones?

A. I did not feel any roughness on the bone at all. It went down and in between two of the ribs. There were two wounds; one in the chest and the other in the head. The latter was only a scalp wound.

Edward Mason.

EDWARD MASON, called by the State and sworn, testified:

I live in Fort Worth; have lived in Fort Worth about nine years; am acquainted with J. W. Davis, the defendant in this case; have known him, I suppose, about five or six years—between five and six

years. During most of that time he was employed by the B. C. Evans Co., in the clothing department, as clothing salesman. He held the position of head salesman in the clothing department; had the management of the clothing department; considered such. The defendant never expressed himself to me otherwise than as feeling all right with B. C. Evans up until about a month or probably some time before that—before the killing of B. C. Evans. He and I were talking on a Sunday, a Sunday or two, together
7 in regard to him taking a situation with me traveling for a New York house, shirt manufactory, and he spoke then several times about the treatment Evans had shown him, given him, keeping somebody else over him, and cutting his salary, &c. He said he had treated him badly—he had put somebody else over him. He had worked there several years, hard, and B. C. would take a new man and put him over him, an old man that had worked hard four or five years, and pay him a better salary, and he intended to get out of it as soon as he could get something to do. I guess he spoke to me about this once or twice. I don't remember exactly how many times, but he talked to me several times. He didn't seem to feel very friendly toward him about it; said he hadn't treated him right; feeling like a man that thought he had been badly treated. He did not make any statement about what he was going to do about it. He made no threats to me at all, anything of that kind; merely said he would quit, and wanted to get out of it as soon as he could; that he intended to get out of it as soon as he could get something else to do; wished he could get something else.

Cross-examined by defendant's attorney:

He did not say he was going to kill Evans. He did not speak unkindly of him, anything than he felt he had been badly treated by him; he had not been treated right by placing somebody else over him.

Q. Didn't speak in disrespectful terms of him, did he?

A. Well, I believe he expressed some language that I would not care to express; that he, Evans, had treated him, Davis, like a damn rascal, or something of that kind; he hadn't treated him right.

Q. Did he make any threats?

A. Didn't say what he would do, or anything of that kind, only he wanted to get out of the house; said he would do it as soon as he could; wanted to get away.

Terry King.

TERRY KING, called for the State, testified as follows:

I am acquainted with the defendant, J. W. Davis. I live in the city of Fort Worth; have been here nearly four years. Before I came here I lived with my father near Handley, in the country. I was raised in the country, near Handley; am a son of Mr.
8 Port King. On the afternoon of the killing of B. C. Evans and before the killing I saw the defendant, J. W. Davis, and

had a conversation with him. Davis came up past my department once or twice; didn't say anything the first time he came up; walked on past and came back directly. The first time he came up, though, there was a stool or something standing in the way. He just sort of kicked it out of the way. I was waiting on some one. As soon as he kicked the stool the noise attracted my attention. I looked around and saw it was him, and he went on down to the clothing department. In a few minutes he came back up there again and remarked—I believe I was measuring some goods—he says, "Hello," or something like that. I said, "Hello, Judge." We always called him Judge. Then he walked on past again and came back; then coming back towards the clothing department he gathered hold of a piece of goods I was measuring and gave that a little jerk and walked on. I didn't say anything to him, just smiled or remarked something, I don't remember exactly what it was. I suppose maybe ten or fifteen minutes, maybe twenty minutes, he came back. I said, "Judge, what is the matter with you?" He says, "Nothing." And I got through with my customer and I says, "Judge, I know there is something wrong with you." And he began to talk; said somebody had told—some one had told some damned lies to Mr. Evans on him, and he was going to get even with him. He says, "I am going to raise hell here before six o'clock." I says, "Judge, don't talk that way, you are talking a little loud there; somebody will think you are drinking." He says, "Terry, I am just as sober as you are." I says, "I know you are, Judge, as far as that is concerned;" I says, "People will think so, anyway." And he said he was going to raise hell with them before six o'clock. The first time he came by there I suppose it was nearly three o'clock, or about half past two; it was before three, though, I think. I think it was something near four o'clock that Evans was killed, I am not sure though. I don't know whether Davis had been to dinner or not when he came and had this conversation with me. He said Mr. Evans had told him he didn't want him any longer than the fifteenth. I heard two of the shots; two that I distinctly heard. I don't believe that Davis told me when Evans had told him he would not want him after the fifteenth. I saw him and Evans talking that morning about nine or ten o'clock. I suppose it was about that time; it might have been later or a
9 little earlier than that; don't remember paying much attention to how long they were talking together; I suppose ten or fifteen minutes, though. I glanced down the counter; I could see them from where I was; couldn't tell whether their manner appeared to be friendly or otherwise when they were talking together; they were too far from me.

Cross-examined by defendant's attorney:

I have been employed in the B. C. Evans Co. house it will be three years the first day of this month. Davis was there when I went there.

Don Pritchard.

DON PRITCHARD, called for the State and sworn, testified as follows:

I am in the gun business; clerk for A. J. Anderson. I remember the day on which B. C. Evans is said to have been killed. I am acquainted with the defendant, J. W. Davis. I saw him on that date; could not say exactly what time; it was about half an hour before I heard of the killing, as well as I remember. I think it was about a half an hour. Davis bought a pistol from me on that occasion. He came in and wanted to know if I would sell him a pistol at cost, and I told him no, I could not do that; I would sell him one close, and he selected a pistol and I loaded it for him. He told me what he wanted with the pistol. He says, "There is a bitch prowling around my house." He says, "There is about a dozen dogs out there and I cannot sleep good, and I want to pepper them up some." He says, "Give me a good pistol," and we selected this pistol, and he said he would take it, for me to load it, and I loaded it. I loaded five barrels. The pistol has only one barrel, but it has six cylinders; shoots six times. I generally load a pistol with six cartridges. He didn't say anything, I don't think, about not putting in but five. He just wanted the pistol loaded. He did not call for any more cartridges than what were in the pistol. After I loaded the pistol he packed it down in his pocket here (coat pocket outside), and I got after him to take a scabbard. We have a rubber scabbard that is very good to keep the rust off. He just remarked, says he, "Oh, I never carry a pistol." I says, "Davis, you will soon ruin the pistol if you don't get a scabbard." I says, "You might carry it sometimes," and he finally taken a scabbard. I don't think he was excited when he was in there. I have known Davis about five or six years, I think; in fact, nearly ever since he has been with that house. I did not notice anything unusual about his manner, at all. I could not be positive how long it was after he got the pistol that I heard of the shooting; to the best of my belief it was about half an hour; this all occurred in Tarrant county, Texas.

Cross-examined by defendant's attorney:

It was in the afternoon that Davis got this pistol. My dinner was about two. I had been to dinner; don't remember how long exactly I had been to dinner, but at that time I did not go to dinner until about two; may be it was half past one; between one and two I got my dinner. I am generally gone about three-quarters of an hour; something like that.

Q. Was it directly you came back that Davis came in and got the pistol or a very few minutes afterwards?

A. I don't think it was a few minutes. I couldn't say how long it was. I never thought of the time.

A. L. Eckert.

A. L. ECKERT, called for the State and sworn, testified as follows:

My name is Albert L. Eckert. I was at the store of the B. C. Evans Co. on the afternoon of the sixth of July, the day that Evans was killed. I was there about four o'clock, only a few minutes before Evans was killed. I heard the shots. (The diagram made and testified to by A. N. Dawson was shown this witness.) I recognize this diagram. I was right there at that safe. Evans was sitting in the chair marked in the diagram. I think the chair was further in the door. I had been there some twenty minutes or half an hour. When I was there Davis passed through this building. He came through from the west opening and passed through this front door. I had not been there but a little while when he first came in. He came in again and walked up about there. I was standing here against the safe. Evans was sitting there and I was facing him, talking to him, and Davis walked up to there and stopped. I saw Davis when he walked up. He stopped there and I turned around and faced him. He was then making a motion like this, going in for a paper. I thought he wanted to show it to Mr. Evans. When I turned around Davis turned around and went back through that opening; not a word was spoken.
11 Davis said nothing and Evans said nothing; had not been a word exchanged at all. I did not see anything more of Davis after that. I left Evans right there, sitting in the chair, reading a paper. I think Evans was sitting further back than the diagram indicates, nearer the front door. When I left I went on back up through the carpet department, through the archway, back to the office. I had got into the office and started back when I heard the shots. I just went to the office and turned some money over that I had collected, and just laid the money down there and got back to the shoe department, some place right up in there, and heard the shots. I never recognized but four shots. I was standing here when I heard the first shot fired, down there by the shoe department, and ran up here through the main building, and when I got here I heard two more shots fired. I hesitated a minute there; then I ran up to the door here (on Main street) and ran on to there, and the last shot was fired when I was about there to the door. I ran out here then, and as I ran out here I saw Farmer coming there. I went in there and found Evans, Davis, and Farmer. There were Hollingsworth and a clerk back in the carpet department. Nobody else was in the front; don't recollect anybody. Evans was lying down here on his face, with his head right across this thing, and his feet were lying out this way towards the door. When I left Evans, before the killing, he had a newspaper in his hands. I examined his body afterwards and found a newspaper in his hands, which newspaper I now produce. (Witness produced a newspaper.) When I got there after he was dead he was holding the newspaper down this way—sort of doubled up underneath him. I made an exami-

nation of his body and found, I believe, two bits in money, a bunch of keys, a watch charm, and an old, broken knife. I found no weapons of any sort on him but the knife. The knife was in his pants pocket. It was closed. It was a little, white-handled knife. The blade was broken. I never paid much attention to the watch charm. I think it was a Masonic charm or something. I saw where the balls hit Evans. One ball struck him about here (in the breast) and one about here (on the top of the head). There was a ball hole in the floor inside of the railing. I don't suppose it was more than a foot from where Evans was lying. There were two other bullet holes out farther, about four feet from his body or head.

12 Farmer just ran in on Davis and grabbed him by the right hand. He had a pistol in his right hand—that way. He says, "Consider yourself under arrest." Davis says, "How do you do, Farmer?" Then he reached out for the pistol, and he says, "I submit;" told him to hand him the pistol and he handed it over to him. Evans was alive when I got in there. I suppose he was. I think he lived maybe three or four minutes. He said, "My God!" and "Oh, Lord!" a time or two. He repeated that two or three times.

Cross-examined by defendant's attorney:

When I found Evans on the floor his feet could not be more than two feet from the chair I had seen him sitting in. The chair was down close to the door, something in the door. The chair was right at the outside door, sort of resting against the door. Evans was sitting right in the door. When I found him on the floor his head was about midway between the east and west end of the railing. Here is a post right here, and his head was across there, a little west of half of the railing. I think that office is about ten feet long; maybe twelve. His feet were two or three feet from the door. His feet were sort of over by the corner of that desk.

Redirect examination:

The bottom railing—there was a post; sets up about as high as that, and his chin was resting right over it. His arms were right that way—up against it. This railing was between his arms and chin. His head was prot-uted out on this side. There is a curtain coming down then from this railing here—a little, narrow curtain. There was a bullet hole in the curtain right over where his head was.

Recross-examination:

I think the paper was in his right hand. It was sort of underneath him when he was lying down. I don't know positively whether it was in his right hand or left. I would not swear positively where it was.

(By State's attorney:)

Q. What is your best recollection which hand it was in?
A. I think it was in his right hand.

(By defendant's attorney:)

Q. You would not pretend to say which hand it was in?

A. I would not swear which hand it was in, but I think it was in his right hand. That is my opinion.

13 *Walter Wyatt.*

WALTER WYATT, called for the State and sworn, testified as follows:

I remember the date B. C. Evans was killed. I was working in the store on that day, in the clothing department most of the time—in the carpet department. I saw the defendant, J. W. Davis, a few moments before the killing of B. C. Evans. I was standing right there at the opening in the back part of the building—right this side of it—at a basket that goes up there. I saw the defendant Davis. He passed by me and went and looked in the carpet department. He went right through that archway; don't know how far in he went. I was standing back this side of the shelving. He came back immediately and went around into a little dressing-room we have over this side of the building here, on the south side of the clothing department; couldn't say exactly how long he was in there, perhaps some three or four minutes; then he came back, went right through that opening in the rear, between the carpet and clothing department. When he went in there I started up to the front of the store, behind the counter in the clothing department. I heard some shots when I had gone, I suppose, about two-thirds of the distance; maybe a little further. I could not say exactly. I was up there where we have a basket—up toward the front of the house. I had just gotten up there. I started east in the clothing department just after Davis went through the door into the carpet department. I turned around and walked up through the building; went just an ordinary gate. I had gotten about two-thirds of the way or probably a little more when I heard the shots. I couldn't tell exactly where the shots came from. I heard the shots and started out to the east end of the building.

Cross-examined:

I was in the employ of Evans at that time and am still in their employ.

W. F. Rogers.

W. F. ROGERS, called for the State and sworn, testified as follows:

I am acquainted with the defendant, J. W. Davis. I am working for the B. C. Evans Co., and was working for them on the day when B. C. Evans was killed. I was working in the clothing department.

14 B. C. Evans and Davis had a conversation on the morning of the killing, I suppose about ten o'clock, just beyond the center of the clothing department; don't know how long

they were talking there. I suppose possibly twenty or thirty minutes. I passed by them frequently when they were talking; heard just a few words said as I passed back and forwards. I heard Evans say, "You have been doing this way a good while, and"—and that was all I heard of it. I don't believe I heard anything else said as I passed by.

Q. What was the manner of the conversation? Was it angry or friendly?

A. Well, it just seemed to be neither one especially at that time; no anger in the matter that I could hear at all. I did not notice any anger during any time they were talking there together. When Evans walked off he spoke about having a big lot of shirts on hand. I suppose he was talking to Davis. There was no — else there but Davis. He said, "You have a big line of shirts." His manner seemed to be pleasant. I did not hear Davis make any reply. There is a piece of curtain covering the front opening between the clothing department and carpet departments. Shortly before the killing I saw Davis go there and look through. The curtain was in two pieces and came together in the center. He pulled one of them one side and looked in through. The first time he went down there and looked through was, I suppose, two or three hours before the killing; maybe longer. I don't remember. I saw him look through there twice that day. The last time was, I should say, probably thirty minutes before the killing. After he went away I looked through there and saw Evans and Eckert in the office. I should say that was about thirty minutes before the shooting, but I don't know.

(No cross-examination.)

Hugh Elliston.

HUGH ELLISTON, called for the State and sworn, testified as follows:

My name is Hugh Elliston. I live in Fort Worth now; have been here over a year. I was raised out near Birdville; am Frank Elliston's son. I am at present working in the carpet department of the B. C. Evans Co. I was there on the afternoon on which B. C. Evans was killed. He was killed about five minutes to four in the afternoon, as near as I remember. When he was killed I was in the back part of the carpet department in about four feet of the stairway. I suppose north of the stairway—about three or four feet north of the east end of the stairway. I saw Davis come in there several times that day. I saw Evans come in. He came in before Davis did and walked down to the little office in the corner of the carpet department and sat down in a chair at about the place indicated by the diagram now shown me (being the Dawson diagram). Evans came in probably eight or ten minutes before he was killed; not over ten minutes, I don't think. I heard Al. Eckert talking to him down there in front. Evans had been in there five minutes, I suppose, when Davis came in. Well, Davis came

in once or twice before. He came in and walked down to the front and walked out the front door the first time. The second time, I suppose, he walked about half way from the stairway to the office and stopped, turned around, and walked back in the clothing department. Those times he came through these openings in the rear from the clothing department to the carpet department. He did not come back again until the killing. Then he entered again and walked down to the office, and then the killing occurred. I never saw him any more. During those times when he came in Evans was talking to Eckert. At the last time Davis came in nobody was talking with Evans. He was reading a paper, sitting in that chair where it is marked on the diagram, leaning back, holding the paper with both hands. I looked at him a minute or two minutes before he was killed, and he was holding the paper up in front of him with both hands. When he was shot I know that he was sitting in the chair reading the paper. I saw him when he fell. The first shot he started to rise to his feet that way, threw his hands up, and fell right forward, right on his face; you might say on his side like; but he threw his hands up and fell forward from the chair. He had the paper in his hands when he fell. As he fell forward he said, as near as I remember, "Oh, Mr. Davis, don't," or something to that effect, as he was falling.

Q. Could you hear that distinctly?

A. I could hear it; yes, sir. That was all I heard, and could hear most all that was said. They were spoken very loud. Davis never spoke. Standing where I was, just a common conversation, I can't hear the exact words, but then I can hear that they are talking. I did not hear any other talking that I did not understand. I don't think there was any other talking. If there was I didn't hear
16 it. I could have heard it if there had been. I could not distinguish but four shots fired; the first shot, and then three more in quick succession, is all I could distinguish. Press Hollingsworth and myself were in that store at the time, and Davis and Evans were down at the front. No one else was there. I am positive there was no one else there. After the shooting Farmer arrested Davis. Mr. Farmer was the first man who came into the building after the shooting. He was the city marshall. I did not see him when he came in. I was not at the front. I stepped in the clothing department—that is, at the door—and then I came in again and Farmer was there, and others were in there at that time. I don't know exactly who all. Farmer was right in front. When I stepped ba-k into the clothing department there was no one down in front but Davis and Evans. They were the only two men in the house at that time. Three shots had been fired, I think, when I stepped back.

Cross-examined:

When I saw the shooting I was at the right of that way there northeast of the stairway. I suppose it is about 55 feet from the stairway to where the killing took place. The stairway is right in the center of this building, near the west end. There is nothing

between there and where the killing occurred; no goods or anything of that sort. There was not anybody there with Evans and Davis—that is, at the office. There were no words spoken between them. I am certain of that, because I could have heard it if there had been, and there were no words spoken at all. The chair in which Mr. Evans was sitting was fronting about southwest. It was not fronting exactly the desk; it was fronting more southwest. The desk fronts out to the south—just about south. I could not distinguish but four shots; could not say positively whether there was any more than that fired or not. There were no words passed between them. I am in the employ of the B. C. Evans Co. now, and was in their employ at the time this killing took place. The first shot of the pistol attracted my attention down there first. Press Hollingsworth and myself were at that time discussing an order—two orders—that came in at that time. The shot first attracted my attention down to where it occurred. I was talking with Hollingsworth. As well as I remember, we were facing south when the shot occurred. My face was fronting south, too. We were stand-
17 ing side by side. When I first heard the shot I looked down that way.

Redirect examination:

When I looked down there Evans was in the act of rising. Just as I looked he came this way (here the witness partially arose from his chair) and threw his hands up to his face, this way, and fell forward. This happened in Fort Worth, Tarrant county, State of Texas.

W. R. McLaury.

W. R. McLAURY, called for the State and sworn, testified as follows:

My name is W. R. McLaury. I am practicing law. I saw B. C. Evans killed. I was across Main street, right opposite the south wall of the Evans building and about five feet south of it. It would be very nearly opposite the south wall of the clothing department, as well as I can calculate. I think the bank building is 25 feet, and the south half of the building Evans was in is 25 feet, and I was right at the center of the first fifty feet north from First street. That would make me 25 feet from First street, and that would bring me across the street (Main street) right here, whatever the width of that street was. I was leaning against the south side of the entrance to Capt. Hanna's old building, the one built by him. I was standing leaning with my feet just on the edge of the iron, and perhaps a foot out, leaning my head against a sign there. I don't remember whose sign it was. Mr. Evans—I didn't know it was him at the time; I thought it was Hollingsworth, perhaps—was sitting there in the chair (in the railed office shown on the Dawson diagram, which is now shown to the witness). I think that desk was farther down this way, if that is the desk. Well, he was sitting there just inside of the door (the Main-street door) in a low chair. I know the chair very well. It is a low chair that has a screw bottom to it to turn round in. He

was facing a little bit to the right and reading a newspaper. I think it was open full size, because I could see the newspaper on both sides of him. He seemed to hold it in that way (witness illustrated), and Davis came down here (from the west), walking down here. His gate was deliberate, just walking slow, and when he stopped right—well, a few feet; maybe five or six feet; I could not tell the distance, but only a little distance, close enough to address any person in a low conversational tone—he put out his hand that way,
and I heard something said. I don't remember what that
18 was. When Davis came down there Mr. Evans—I know now
that it was him; I didn't at that immediate time—moved the paper that way (to the side) and turned his head a little, and Davis reached his hand out and immediately I saw a puff of smoke, and just about that time—just before the puff of smoke—I heard some words spoken by Evans, and then another shot. When the first shot was fired Evans began to pitch forward and fell, and as he was pitching another shot was fired. When he was about that way (upon his feet, bending forward) the second shot was fired; and there is a little railing—now, when the second shot was fired or before it, I think between the first and second shot, I had got nearly to the edge of the sidewalk in front of the office, starting to go there; then I saw some one coming here. I don't remember who it was. I saw some people running across the street, and I knew they would go there, and I knew the building very well, and instead of—when I got about here I turned and ran through in the clothing department and ran through the back opening—ran through the clothing department as far as I could and came around and met Sam. Farmer. He had walked from this place ten feet; maybe a little farther. When Davis walked up, before I saw the puff of smoke, he stopped and put out his hand immediately—just put his hand out as if he was going to hand something to some party or holding it to look at, and then came the puff of smoke. When the puff of smoke had took place Evans had just moved his newspaper a little to the right and turned his head a little to the left, and was looking at Davis—had raised his head a little. I don't think there was anybody on the sidewalk in front of there. I did not see anybody about the front door anywhere. I know there was no one there at the time the shot occurred except Davis and Evans. I believe I am safe in saying that there was no one on the sidewalk in front of there. I know there was not. There was nobody in the front door of the office. There was no one in either front door.

Cross-examined:

There are two doors in that part of the building. Evans was sitting inside of one door, the north door. There is a little desk there that they use, I suppose, for that department. There is a door there that is open (the north leaf of the office door). I heard, just
before the puff of smoke and when the hand was extended
19 that way, Evans did say something. Before that hand was
extended I did not hear anything said. I don't think there was anything said. I was just across the street when I saw these

men. I have never measured the width of the street, and don't know how wide it is.

Q. Well, do you pretend to say that you could hear what was said by those two men, and they in the house and you clear on the other side of the street?

A. Well, I don't. I say if they talked loud enough I could hear; but I did not hear anything, only the one exclamation. That was before the shooting. It was just as the arm was pointed. I don't know whether they said anything before that or not. Davis might have said something, but I don't think Evans saw Davis until he was within a few feet.

Q. You don't know whether he did or not, do you?

A. I don't think he could see through a newspaper. Unless he could he couldn't see. He turned his newspaper to one side when Davis, I should say, — within five feet, maybe seven feet, of him. When I first saw those parties I was standing right opposite the south wall of the clothing department. That point is possibly fifty feet from the north part of the carpet department. I was standing on the other side of the street from that place (south wall of the clothing department). I was not on the sidewalk. I was standing on what they call the threshold. I was the full width of the street and sidewalk. That door (indicating on the diagram) was turned back that way and this door was turned in this way, I suppose, or else they were double here. Anyway, they were all open, and this door here was open; maybe this door here was closed up. They call it fifty feet from the north to the south side of the Evans building. I was opposite the south side. I expect I was about eight feet from the office.

Q. I want to know if you can state positively that you could hear what was said by either of those parties before the shooting took place.

A. I think, if I had been paying attention, I would have known what they said, but I was not paying attention any further than just looking. I was not listening. Whether or not, from where I was standing, I could hear what was said by Davis and Evans when they came together down there before the shooting, or whether they said anything or not, would depend on the tone of voice. If they spoke loud I would have been able to hear; if they spoke low I would not. I do know something was said. I know Evans said something, and just when he said it the shot was fired. I didn't see any difficulty; there was no disturbance. A difficulty is where two parties contend, as I understand it, and I didn't see anything of that kind at all.

Q. I would like an answer to my question, whether standing across the street, and diagonally across the street from where those parties were, whether there were any words passed between them before the pistol was drawn or presented.

A. I should say not. There was nothing that I heard.

Pres Hollingsworth.

PRES HOLLINGSWORTH, called by the State and sworn, testified as follows:

I live in Fort Worth; am in the employ of the B. C. Evans Co. I was present on the day when B. C. Evans was killed. (The Dawson diagram was here shown witness.) This diagram represents the clothing department south and the carpet department north. I was present there that day when the killing took place. I was in the carpet department. I have charge of that department. I saw Mr. Evans when he first came in. He came in from the rear door and walked towards that little office and sat down in a chair. The diagram is correct as to the location of the chair in which he sat. The first one he spoke to, when he first came in, was Elliston, there in the room, then Eckert. I saw Davis come from the rear door leading from the clothing department to the carpet department. He went towards the front, but after he got up that way I didn't notice where he went. Evans was in the front, in the office. I didn't see Davis again. When he came in the last time I saw him. When he came in the first time Eckert was with Evans. When he came in the last time Evans was all by himself. Eckert had left him a very short time, and Eckert went through this back door, in the west end. Eckert had gone out of that back door only a few moments when Davis came in it. When Davis came in he walked directly to the front. What first attracted my attention was the first shot of the pistol. I looked then and Davis was standing right along there. (Witness designates upon the diagram.) He had just about time to walk the length of the building when I heard the first shot. He was going in a moderate gate when I saw him. From the time Evans came into the carpet department until the
21 time he was killed was not very long. I couldn't say exactly how long. Davis just had time to get where he was when I heard the shot. I then looked that way and saw Evans. He was then in a rising position from the chair. (Witness illustrates the position in which he saw Evans.) That was after the shooting. He went right straight forward—fell forward. I think there were five shots fired altogether. All that was said at all was Mr. Evans hollered, "Oh, Mr. Davis!" That was the first shot. I did not hear Davis say anything. He did not say anything. No one was in the front part of the house besides Davis and Evans. I am certain of that. There was nothing to obstruct my view right out. My view was clear.

Cross-examined:

When the first shot was fired I was just about here; north of the stair; close to the stair. The stairway is near the center of the west end of the carpet-room. I was sitting on a counter at the time. The goods are not piled nearly as high as my head there. I was sitting on the end of the counter at the first shot. I had an order

book in my hand looking over it. I was facing south. I was facing the stairway. That would be in the direction the killing took place. I don't think it would be in the opposite direction at all; it would be south. I was not looking towards the office when the first shot was fired. I should judge it was something near 70 feet from where I was to where the killing occurred. I am prepared to say there were no words used by either of those men down there until after the first shot was fired. I heard the conversation between Evans and the gentleman he was with just before. They were talking in an ordinary tone. The gentleman he was talking with was Eckert. I don't know whether there was anybody out here on Main street. It is a short space from the chair Evans was sitting in to the outside of the sidewalk; I suppose about four feet. There was nothing to obstruct my view at the time.

Q. Isn't there a counter running down there upon which you pile up a great many goods?

A. No, sir; there is a counter right along here. It extends only about 12 feet, I suppose, down that way; something of that kind—15 feet. I was sitting on the counter beyond that. At the time there was no goods at all on that counter; if there was it was not piled over six or eight inches high. I am in charge of the carpet department. I was managing it then; am still in the em-
22 ploy of that business. Mr. Elliston was with me at that time. Nobody else was there. We were not sitting side by side; he was in front of me, standing up; we were facing one another. I think at the time he was facing north, and I was sitting down facing south. I was sitting down and he was standing up, I think, at the time. The doors in front were open just as shown in the diagram (being the north leaf of the office door and both leaves of the double door next south). When I heard the first shot I looked around instantly. I never said to anybody that I only heard the shots, but did not see this.

Thereupon the State rested.

Dr. W. A. Duringer.

Dr. W. A. DURINGER, called for the defendant and sworn, testified

I am a physician and surgeon; have been practicing in Fort Worth since 1885. I examined the deceased after the killing. The bullet ranged downward and inward on the right—that is, it ranged from the left in toward the right and downward. As to this downward range, that somewhat indicates the position of the person who is shot at the time of the shot. Muscle or bone frequently would deflect a ball and cause it to range in most any direction.

No cross-examination.

G. L. Harris.

G. L. HARRIS, called for the defendant and sworn, testified:

I reside four miles north of Fort Worth, on the Blue Mound road;

have been a resident of this county about six years. I remember the occurrence of the killing of B. C. Evans. I don't know the date; I remember the killing. I was there at the house at that time. (The Dawson diagram was here shown to witness.) I was just inside the carpet department. I was just to the left and just inside the carpet department. I was not inside of the office railing at all. I was just inside of the door here. (Next south of the office.) I was in such a position that I could see the defendant and Evans. I had just stepped inside the door. There was a word spoken between them, but I was not concerned and paid no attention to it. I couldn't tell you exactly what he said. Davis spoke something, but I could not say what. Evans he made some reply, and I could not state exactly what that was, for I was unconcerned in it all. If
I recollect right, Evans was sitting inside this railing some-
23 where, sitting right along in there, and defendant was somewhere about here, not a great ways from the corner of that railing. Just as I stepped inside, I barely got inside, and I was against the opposite side, pretty near against the opposite wall from this railing, and I stepped in; it is very narrow in here, and there was something said by Davis and also by Evans. I knowed Davis' face; I knowed his name was Davis, and I could see that it was B. C. Evans, and Evans raised to his feet—just about got straight to his feet when the shooting commenced, and when I saw the shooting commence I commenced falling back. I got right outside; I backed right out.

Q. I will ask you whether or not Evans moved his position?

A. I couldn't say that he moved more than this; we will say sort of turned his body. I don't know that he moved his feet. I think may be he did. I won't be sure about that. Evans was either getting up or straight when the first shot was fired. That is my recollection about it. He did not go anywhere when he rose to his feet; didn't move the position where he was standing, only just got straight. I would not say he was actually straight when the shooting commenced. The first thing that drawed my attention to the two men when I stepped in there was a word spoken by Davis, then by Evans. Of course I had no interest in that. I didn't care anything for it. But the first that drawed my attention to the two men was the shooting. I did not see Evans fall. There was such a smoke I could not see. You can see from the position I was not in the range of the balls, but then I was a little out that way and felt a little anxious myself. I did not see any other man at that time. I was not looking. There might have been other men in the house, but I did not see them. I could not tell you what Evans and Davis said. I didn't pay any attention. It was something I was not interested in.

Q. I will ask you if you did not state to Mr. Finch directly after this occurred, the same day, in the presence of Mr. McKnight that the damned lie was passed between those gentlemen, and, as Mr. Evans called Mr. Davis a damned liar, that he got up out of his seat and made a step or two towards him with his right hand down back of his body?

A. No, sir; I tell you what I think I stated to Mr. Finch. I was not talking to Mr. Finch. He was present. I was talking to Mr. Daggett. He was the man I was talking to. Finch was present, of course. I told Finch that there was a word or two spoken, and that I believed that B. C. Evans—Daggett asked me if there was any abrupt language, and I told Mr. Daggett that I believed that—I wouldn't be sure then nor I won't be sure now, as I told you awhile ago; I believe, though, that B. C. Evans gave him the damned lie, but I was not certain of that and would not say it positive and am not yet. I did not state to Finch or to Daggett or any one else in his presence that when the damned lie was passed Evans got up out of his chair and made one or two steps in the direction of the defendant and dropped his hands down behind him.

Cross-examined:

It is not a fact that I was not there at all.

Henry Finch.

HENRY FINCH, called for the defendant and sworn, testified as follows:

I have been sworn. I have seen Harris, the witness who has just left the stand, once before, I believe, only. I was not in the locality of the killing when it occurred. I was at home, I presume, when it occurred—that is, I didn't hear of it until I started up, and I live a mile from the square and come on the street car. You can judge about how long I was coming here. It must have been some fifteen or twenty minutes, though I don't know how long it was. As Harris just said, he was not telling me about this. At the time I met Harris I had got to McKnight's. There are probably two or three 25-feet lots between McKnight's and the carpet store where the killing occurred. I heard Harris make a statement there to Daggett about the killing. Daggett called him aside, and we three went together; just stepped into McKnight's, and he made the statement. Harris then and there stated that he saw the killing and heard what was said, and that the damned lie was passed between the defendant and Evans. After having said the damned lie passed between them he said—I don't remember which it was—Evans arose, and Davis then told him not to advance, but thereupon he did make a move to advance and Davis shot. I asked him about where his hands were, and he said he could not see his hands. I don't know that I asked him where he put his hands or not, but I asked him what he had in his hands, and he said he could not see them. I was asking him, though, as to what he had in his hands. Daggett began interrogating him, and then I asked him this other question myself about what he was doing with his hands. That could not have been but a few minutes after the killing. As I said, I do not know when the trouble occurred exactly, but it was within a few minutes afterwards. Something like half an hour, possibly. Harris

was in McKnight's store when he made the statement. I didn't then know he was. I believe there is one door and an alley, may be two doors and an alley, between McKnight's store and the Evans establishment. It could not be over fifty or seventy feet.

Cross-examined:

I don't remember whether or not he stated to me he was standing out on the sidewalk in front. My recollection is he said something about being in range of the balls; that is the excuse he gave us for not seeing his hand; said something about being in range of the balls.

Redirect examination:

I conveyed this information to several parties and found out that it was told a different way, and I came up and asked who Harris was, and I had in the meantime repeated to two or three what Harris had said before I heard anything about the statement of those that were in the store. I came back then and got the other statement. I believe I repeated this statement to Mr. Johnson (attorney for defendant) also. I went right down the street and told it to several parties; they asked me what I had heard about that and I told them what Harris said.

The court then instructed the jury orally as follows:

GENTLEMEN OF THE JURY: You are instructed that as to the testimony of this witness as to what the witness Harris told him you are not to consider it at all as evidence of what occurred. It can only be considered by you and is only admitted for the purpose of contradicting the witness Harris and no other. You must not consider it as testimony, however, of the facts which he says Harris related to him.

J. W. Davis.

J. W. DAVIS, defendant, was sworn in his own behalf and testified as follows:

I have been a resident of Fort Worth about six years the last time, I think. During that time I have been with the B. C. Evans Co. about six years employed in the clothing department.

Q. Will you just relate to the court and jury——

A. Well, I suppose it was between nine and ten o'clock, Mr. Evans came down in the store and commenced talking with me; asked me how the stock was and a good many questions, and then he says, "Mr. Davis, I don't think I will need your services any longer than the 15th;" and he says, "This is not all;" he says, "I have it from the very best information that you have been too intimate with a lady here in the house." I says, "Mr. Evans, what lady is that?" and he says, "It is enough for you to know that you quit on the 15th," and walked off. That was, I suppose, between nine and ten o'clock. He went off and I commenced wait-

ing on a customer and I did not see Mr. Evans any more until afternoon. Well, I went on up to my usual dinner hour, which is 11.30. I usually go at that time, but for some cause or other Frank Lawson wanted to exchange, and he went at twelve o'clock and I went at one, and coming back to the store I walked up and down the aisle several times and King asked me, he says, "Judge"—that is the nickname they called me for a good long while—he says, "what is the matter with you?" and I told him that I was mad and didn't tell him at first. I don't believe I gave him any answer when he first asked me, and I says, "Terry, there's some one in the house been slandering me and I will give him the mischief if I find out who it is;" thereupon I walked off. We didn't talk but just a few minutes. I didn't see Mr. Evans from about 9.30, somewhere along there, until I got my dinner. I saw him in the afternoon after dinner. I think the first time I saw him was behind the dress-goods counter talking with some one, I forgot who now, and I passed on down, passed by the counter two or three times, and walked in the carpet-room two or three times, and when I saw him there I asked him—I says, "Mr. Evans, I think I have a right to know what lady you have reference to, sir." He says, "Davis, you know well enough who I have reference to," and, he says, "Mrs. Randle and Miss Rafferty are no better." I says, "Mr. Evans, if you make that accusation you are a liar," and he told me, "You are a God damned liar;" then he raised up, advanced towards me, threw his hand here to one side as if to draw a pistol, and I commenced shooting.

Q. What other ladies were in that establishment besides the ladies you have mentioned?

A. Mrs. Gracey. Mrs. Gracey and I were engaged at that time, engaged to be married, and had been for a good long while. I think she had been in that house possibly about three years.

27 Cross-examined:

I expect she is still there. Last accounts, I think she was.

Redirect examination:

I have never mentioned a word of this to her. I have not seen her. I have never opened my mouth before this about this.

Thereupon defendant rested.

Sam. Farmer.

SAM. FARMER, called for the State in rebuttal, testified:

I am marshall and chief of police of Fort Worth. I remember the circumstances of Evans being killed. I witnessed a part of that killing; a little of it. I came in just as Davis fired the last shot. When my attention was first called to it I was on the street car on Main-street car line going south. I was very nearly opposite the place of the killing when I first heard of it. When I heard of it I jumped off the car and ran over. When I jumped off the car I did not see any one on the sidewalk in front of that building. There

was nothing to obstruct my vision when I jumped off the car, except there was some wagons between me and the sidewalk when I first jumped off the car. The shooting was not over when I got to the house. There was one shot fired after I got to the door. I did not see anybody in the front part of the house here. There was nobody there in front except Evans and Davis.

Cross-examined:

I was on the street car when I heard the first shot. Just as I got to the door of Bran's saloon there was one shot fired, and I saw the dust fly up on the street-car track. I first thought that it was in that saloon and started to go in there. That is the first door this side of the carpet store. I got to where they were; just stepped on to the door step when the last shot was fired. If there was any other person in there it was behind the carpets or something. I looked for somebody the first thing I done when I got in there. If there was anybody there I didn't see them.

Redirect examination:

I looked to see if there was anybody there. From the time I heard the first shot until I got there my face was towards the door all the time. Nobody came out of the door from the time the first shot was fired until I got there. I don't think they could have come out without my seeing them.

28 *Henry Gates.*

HENRY GATES, for the State in rebuttal, testified:

I live in Fort Worth, Tarrant county. I am a carpenter, generally, by trade. I was on Main street, in the city of Fort Worth, on the afternoon of the 6th of July, when B. C. Evans was killed. I was standing right on the sidewalk, right to the far door of Capt. Kyles' saloon. Mr. Smith was with me. There was several standing there. Mr. Stepp was with us, too. I was standing with my left side down the street. Smith was sitting on a barrel and I was standing talking with him. I heard the first shot. I was looking right down Main street on the sidewalk when I heard the first shot. I was on the same side of the street the B. C. Evans house was on. There was nothing between me and the carpet department when I looked down there. There was nobody at all on the sidewalk down there. When I heard the shot Sam. Farmer was standing right behind me talking with some one, and he came past me and I followed him up. I was facing right down the street when I was going. Nobody came out of those doors when I was going. Sam. Farmer and me were right close by the door. There was nothing to obstruct my view on the sidewalk at all. I don't think there could have been anybody there without my seeing them. When I went down there I stopped at the first door of the carpet-room, and I saw a man laying on the floor, and I didn't know who it was. I saw he was shot, and stopped at that door and stepped up into the door and looked at

him; then I got down and went around in the door. I found nobody but Davis when I got there, and the man lying down. Farmer was talking with Davis. I was not paying much attention. I was looking at the man lying on the floor.

Cross-examined:

I was talking with Smith when I first heard the shot. Mr. Step was standing right by. I was on the right-hand side of Main street, on the same side the Evans store was, where the killing occurred. I was north of where the killing occurred.

Q. And you say you saw nobody at all excepting Smith?

A. Nobody at all betwixt where I was and the shooting. There was nobody betwixt where I was and the shooting. I followed Farmer right up there. Farmer came running past me as I turned to look where the shot was, and I followed him right up. He 29 came up behind me and I followed him up there. I suppose it was about seventy-five or eighty feet from where I was standing when the first shot was fired to where the shooting took place. I followed Farmer right up there when I heard the first shot. Farmer went in the second door. I stopped at the first door of the carpet-room, where Evans was lying, and went around and went into the door Farmer went in. All the shots had been fired before I got in the house. They had all been fired before Farmer went in, because I told him myself not to be in a hurry to go in that door, because the smoke was coming out of the door. They was all fired, I think, before we got in; about the time he got to the door, anyhow. One or two shots were fired pretty quick, one after the other; then he took them kind of slow. I am certain Farmer and I got in there after all the shots had been fired, because I was not going to go in that door while that smoke was coming out there. I am positive Farmer went in after all the shots were fired. I think the last shot was fired about the time he got to the door. Farmer came from above me. I saw him a few minutes before the shooting commenced standing above me talking with some one—I don't know who—north of me. He was on the sidewalk. I don't know how many minutes he was there, this side of me, on the sidewalk when the shooting comenced. I saw him standing there before the shooting commenced, because I was standing there talking to Smith, and saw Farmer. When he was talking with that man I reckon he was two or three steps from me. It is not a fact that he got off the street car and came over there. I noticed him standing there some several minutes. He may have got off the street car and came across when I first saw him there, but he was standing there when the shooting commenced. I know that, for I am very well acquainted with him; don't know what length of time he was standing there.

S. M. Smith.

S. M. SMITH, called for the State, testified as follows:

I live in Fort Worth; run a job wagon. I recollect the afternoon

that B. C. Evans was killed. I heard the shooting. I was on the sidewalk by the side of the door of the Trinity saloon. Gates was with me. I believe his name is Henry Gates. We were on the same side of the street that B. C. Evans Co.'s store is. I should judge we were between 75 and 100 feet from the carpet department of
30 that store. I heard the first shot. I was looking towards the court-house at that time. When I heard the first shot I turned around and looked at the street car. Just in a few moments the second shot came, and I saw the smokee oming out of the door. There was nothing to obstruct my view from where I was down to where I saw the smoke coming out. There was nobody standing out on the sidewalk in front of that house. I kept my face in that direction after that. There were five shots fired. That is my recollection. Nobody came out of the door there in front of that house during that time. Sam. Farmer went in. He was the first man to go in. He jumped off the street car going by. Gates left me as soon as the second shot was fired and followed Sam. right down; ran right down to the door and went in. I think Farmer had passed up the street a few minutes before that. There is a street-car stopping and starting place right on the corner there, about fifty feet, I should judge, from where I was at.

Cross-examined:

Gates was giving a prescription for the chills and I was writing it down; can't tell how long I had been there. In running a wagon, when we are not busy, that is our headquarters. We stop there. My team stood right in front of Brand's place. I afterward went up there where the killing occurred; didn't start just as soon as I heard the firing commence. I didn't see in the room at all. I was not where I could see in the room. I was on the sidewalk. When the firing took place Farmer jumped off the street car; think he jumped off after the first shot. The car was then right in front of Brand's place when he first shot. That is next door to the carpet department of the B. C. Evans Co., and Farmer got right off there. Well, the car had passed by when he got off. We started towards the store, and teams were standing along there, and he had to run this way (northwardly). I know my team stood in front of Brand's place and he ran around my team to get on the sidewalk. There is an alley there, about twenty-foot alley, and my horses' heads were at the alley facing this way, and he ran around coming from the car. In jumping off the car he ran right toward the store, and then he had to come this way to come around my team and get to the sidewalk.

R. F. Stepp.

R. F. STEPP, called for the State and sworn, testified as follows:

31 I just work at general work here; nursery most of the time. I recollect the circumstances when Evans was killed. I heard the shooting. I was on Main street, right fronting the stairway over McKnight's saloon, on the same side of the street the Evans house

was on. Nobody was with me, without it was McKnight, inside. Smith and Gates were behind me. I did not notice anybody else around there, only Smith and Gates. I heard the first shot fired. When the first shot was fired my face was turned east—across the street. When I heard the first shot fired I got up, looked right down the way the shot was, and didn't see anybody at all on the sidewalk. There was nothing to keep me from seeing them. I was standing right on the sidewalk, I suppose, about 75 or 80 feet off. I went up there after the second shot. All the time the shooting was going on I was looking right down Main street, south; did not see anybody come out of the door during all the time the shooting was going on. Nobody was in front of that door during all that time. Farmer was the first I saw go in; Gates next. I disremember who was the third man went in. I think it was Mr. Thomas; Long Thomas, I think they call him; I won't be positive. I went in about the time Hollingsworth went to shut the door. I was right in front of the house. I went in about the time Gates did—that is, to that door. I went to the front about the time Gates went in the door. I saw in the house from where I was at; didn't see anybody in there, only Farmer and the man that done the shooting—supposed him to be. I didn't see any of the shooting done, and Hollingsworth coming that way, and he asked me to stand back.

Cross-examined:

I got there a very short time after the shooting was all over; directly Farmer went in the house. I didn't get there to see any of the shooting. When they closed that door I didn't see anybody in the house, only Farmer and Gates and Davis. I think I looked at everybody that was in there.

Q. You made it a business, did you, to look to see everybody that was in there?

A. That is what I went in for, was to see. I went there to see what caused the shooting—to see who done the shooting. That is a very large establishment, with a great many goods in it; carpets
32 setting up in rolls all around about there. I would not have noticed a man if he had hid behind the carpets. I do not know whether a man could have been in there and me not noticed him. He could not have been close to where I was—I mean right in front of where Evans was shot—around about the office where the men were standing.

Q. Didn't you see anybody on the street at all around there when you went in?

A. No, sir; there was hardly anybody there when I went in. Farmer got off the street car, I think, and ran that way. He came from the street car. The street car was right there, and I saw him run, drawing his pistol. He had not been standing out there on the sidewalk all this time. I don't know that I had seen him that day before I saw him get off the street car. The street car was coming this way—north—up Main street. I stayed there quite awhile. I could not be positive how long. The shooting was all over before I got in there. It could not have been but a little while after the

shooting before Farmer got in there. The shooting was all over, I think, when Farmer went in. I did not see anything of Mr. Capps, an attorney, around there anywhere; did not see Mr. McLaury around there anywhere; don't know whether he was standing on the opposite side of Main street from the Evans store or not. I was speaking of standing in front of the house. Mr. McLaury was not on the sidewalk in front of Evans. He was not on the sidewalk about the door.

Testimony closed.

We, the undersigned attorneys, hereby agree that the above and foregoing constitutes a true statement of all the evidence introduced upon the above trial. The clerk of the court will attach as part of this statement the diagram now in his office spoken of by the witnesses.

AYERS & FINGER AND
H. M. FURMAN,
Attorneys for the State.
BYRON JOHNSON,
Of Counsel for Appellant, J. W. Davis.

Examined and approved.

R. E. BECKHAM, *Judge.*

Filed November the 12th, A. D. 1889.

L. R. TAYLOR,
District Clerk.

33 *Charge of the Court. Filed Oct.* 11, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } Charge of the Court.

The jury are instructed that every person of sound memory and discretion who shall unlawfully kill any reasonable creature in being with malice aforethought shall be deemed guilty of murder. Murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offence to negligent homicide or manslaughter or which excuse or justify the homicide. "Malice" is that condition of the mind in which a person intentionally does a wrongful act towards another with intent to injure him and is evidenced by such acts as show a heart regardless of social duty and fatally bent on mischief. "Express malice" is where one with a sedate and deliberate mind and formed design unlawfully kills another. By a sedate and deliberate mind is meant that the mind is sufficiently composed, calm, and undisturbed as to admit of reflection and consideration of the design and to comprehend the nature of the act designed. You are further instructed that homicide is justifiable in the protection of the person against any unlawful and violent attack, provided the homicide takes place

while the person killed is in the very act of making such unlawful and violent attack or after some act done by the person killed showing evidently an intent to commit such violence or assault, and a person so assaulted or attacked is not bound to retreat in order to avoid the necessity of killing his assailant. You are instructed, however, that to justify homicide on the ground of self defense against an unlawful or violent attack on one's person the attack must be such as produces a reasonable fear of death or serious bodily injury, and the killing must take place while the person killed is making such attack or after some act done by him showing evidently an intention to do the person committing the homicide some serious bodily harm. You are instructed, however, that to justify homicide in the defence of one's person against an unlawful attack it is not necessary that there should have existed actual danger to the person committing the homicide if it reasonably appeared to him at the time
34 that he was in danger of death or serious bodily injury by attack from the person killed. You are instructed further that if a person provokes a difficulty for the purpose and with the formed design and intent to take the life of his adversary he would not be justifiable in killing his adversary, though in such difficulty he should be reduced to the necessity of killing in order to protect his own life, but such killing would be upon express malice. If you believe from the evidence that the defendant, J. W. Davis, in Tarrant county, at or about the time mentioned in the indictment and prior to the 10th day of September, 1889, did unlawfulfy kill B. C. Evans with "express malice," as hereinbefore defined, you should find him guilty of murder in the first degree and assess his punishment at death or confinement in the penitentiary for life. Unless you believe from the evidence that the defendant did kill said B. C. Evans with "express malice," as hereinbefore explained, you should find him not guilty; or if you beli-ve from the evidence that the defendant did kill said Evans, yet, if you further beli-ve that at the time said Evans was in the act of making a violent and unlawful attack upon the defendant, or that said Evans had then done some act which showed evidently an intention on the part of said Evans to make such attack, and that it reasonably appeared to the defendant that he was in danger of death or serious bodily injury from the deceased, and that he acted on such reasonable apprehension or fear of death or serious bodily injury, you should find him not guilty, though there was in fact no actual danger, unless you should further believe from the evidence that the defendant provoked the difficulty with said Evans for the purpose and with the intent and formed design of taking the life of said Evans. The defendant is presumed to be innocent until his guilt is established by competent evidence, and in case of a reasonable doubt as to his guilt is entitled to be acquitted. The jury are the exclusive judges of the credibility of the witnesses, the weight of the testimony, and of the facts proved.

R. E. BECKHAM, *Judge.*

Filed October 11th, 1889.

L. R. TAYLOR,
District Clerk.

5—1593

35 *Defendant's Bill of Exceptions No.* 1. *Filed Oct.* 26, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the call of the above cause for trial the defendant presented his motion to quash the special venire upon the grounds set out in said motion; which motion was overruled; to which defendant excepted and reserved this bill, which is approved.

R. E. BECKHAM, *Judge.*

Filed October 26th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exceptions No. 2. *Filed Oct.* 26, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the hearing of the defendant's motion to change the venue in the above cause the State presented a counter-affidavit to said motion; to which counter-affidavit the defendant then and there presented his special exceptions in writing as herein filed; which exceptions were by the court overruled; to which ruling the defendant excepted and reserved his bill, which is approved.

R. E. BECKHAM, *Judge.*

Filed October 26th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exceptions No. 3. *Filed Oct.* 21, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the call of the above cause for trial the defendant presented his motion for a change of venue in said cause, and upon reading said motion and counter-affidavit of the
36 State's attorney the defendant introduced in support of said motion the following witnesses, who testified as follows, to wit:

F. P. PENDERY testified as follows:

I reside in Fort Worth. I have heard of some talk of this case. I have no means of knowing the state of public opinion except what I have heard dropped on the street. I never inquired about the case; am not able to say whether there is a prejudice against

the defendant; there may be with a few; do not expect there is among all the people; think there is in the city, but not in the country; have not talked with any one directly about it. I think if care was taken in selecting a jury he could get a fair trial, but do not know. I do not know of such prejudice that would prevent a fair trial. There was excitement on the evening of the killing and some talk of lynching, but excitement has about died out.

N. A. STEADMAN testified as follows:

I am a member of the Fort Worth bar; resided here about six years. My acquaintance is extensive in the country and in the city. Have heard a great many expressions of sentiment as to the killing of B. C. Evans from both city and country, all of which were unfavorable to the defendant. I have heard it said that a mob had been talked about; heard none myself. I read reports of the proceedings of public meetings and read the speech of Mr. Marple, made at one of them, as published in the Gazette here shown me. There was a great deal of excitement at the time. I think there is a prejudice against the defendant to such an extent that he could not get a fair and impartial trial in Tarrant county.

L. N. COOPER testified as follows:

I have lived in Fort Worth about five years; have heard a great deal as to the killing of B. C. Evans. There is evidently a great deal of prejudice, and if the city is an index to the county don't think he could have a fair trial in this county; have not been over the county. My opinion is predicated on the sentiment of the town. Could not say that in the vicinity of Grapevine, Bedford, Birdville, or Smithfield there was such prejudice as to prevent a fair trial; think it doubtful about Mansfield. My acquaintance in the country is limited. Heard several from the country talk about it. There are about one thousand more voters in the country than in the city. Have heard defendant's friends express sympathy for him, but no one favorable as to the case.

J. A. HOLLAND testified as follows:

37 Have resided in Fort Worth, Tarrant county, five years; practised law twenty one or two years; was in the city when Evans was killed. I have heard attorneys, usually conservative men, advocating a mob on the public streets; good many people on the streets when the mob was talked of; have read reports of public meetings; am not extensively acquainted in the country, but have heard country people talk some. My opinion is he could not have an impartial trial.

Cross-examined:

Don't know what would be considered justice and don't know whether the people of the county would do justice in defendant's

35 *Defendant's Bill of Exceptions No.* 1. *Filed Oct.* 26, 1889.

THE STATE OF TEXAS
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R. E. BECKHAM, *Judge.*

Filed October 26th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exceptions No. 2. *Filed Oct.* 26, 1889.

THE STATE OF TEXAS
vs.
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Be it remembered that on the hearing of the defendant's motion to change the venue in the above cause the State presented a counter-affidavit to said motion; to which counter-affidavit the defendant then and there presented his special exceptions in writing as herein filed; which exceptions were by the court overruled; to which ruling the defendant excepted and reserved his bill, which is approved.

R. E. BECKHAM, *Judge.*

Filed October 26th, 1889.

L. R. TAYLOR,
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Defendant's Bill of Exceptions No. 3. *Filed Oct.* 21, 1889.

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Cross-examined:

Don't know what would be considered justice and don't know whether the people of the county would do justice in defendant's

case. A majority of the jurors of the county live outside the city. My opinion is based on the universal sentiment of those with whom I have talked.

J. H. MADDOX testified as follows:

I am deputy sheriff; have heard many expressions of sentiment as to the killing of Evans, both in city and county, from which I judge there is, of course, some prejudice against him; have heard some few speaking favorably of the defendant, but not as to the killing. I have heard a great deal of talk about it. I could not answer as to whether he could get a fair trial or not. No doubt a fair jury could be obtained, but there is considerable prejudice. Public sentiment seems to await a hearing of both sides. People think a jury of twelve men could be obtained in Tarrant county who would give defendant a fair trial. The deceased was a man of great influence. I am acquainted at all the towns in the county, and have heard expressions from people at the different towns; heard none favorable as to defendant. Deceased was not very generally known personally throughout the county.

H. S. BROILES testified as follows:

Am mayor of the city; resided in Tarrant county fifteen years; have heard many express themselves as to the killing of Evans. From my acquaintance, think the defendant would have a great deal of prejudice to combat; think it doubtful if defendant could have a fair trial. I heard of talk about a mob, and directed the marshall to assist the sheriff if needed. There was no mob. I think it would be difficult to secure an impartial jury in the county.

J. W. PUTMAN testified as follows:

City editor of The Mail, published in Fort Worth; have lived in the county several years. For a few days after the killing of Evans there was a great deal of talk about it. From expressions
38 heard, a great many think a very great wrong was done. There is some prejudice against the defendant, if you might call it such. A majority of the expressions are unfavorable to the defendant; was present to report the proceedings of the public meetings; don't remember of applause of speakers at such meetings; thought the meetings were rather quiet. The Mail has a good circulation. From all I have heard, think the defendant could have a fair trial; have no reason for thinking otherwise; don't think the published reports would prevent a fair trial. I never heard the killing endorsed, but have heard some intimation that there might be reason for the killing.

L. N. COOPER, recalled, testified as follows:

I was present at a public meeting and heard speech of Mr. Marple. One or two of his expressions seemed to meet with approval, as evinced by loud and repeated applause. The crowd was very small,

but few business people, to my surprise, being present. I made a speech myself. There were present about one hundred and fifty people.

J. S. DAVIS testified as follows:

I have resided in the city eleven years; have heard considerable expressions of opinion as to the killing of Evans, majority of which were against the defendant, especially immediately after the killing. I think, with the limited number of challenges to the defendant, he would be compelled to take jurors from the city who would be prejudiced against him.

GEORGE BYRNE testified as follows:

I am editor on the editorial staff of the Gazette. I attended no public meetings held in regard to the killing of Evans; have heard a good many expressions of people living in the city; never heard for rewarding the defendant; expressions generally heard were against the killing, but not against the defendant. There is some prejudice against the defendant; was at the building shortly after the killing, and, while there was many expressions of horror, there was apparently little excitement; less than would reasonably be expected. I do not think there exists such prejudice as to prevent defendant having a fair trial; do not know what the circulation of the Gazette is. Mr. Sanders had charge of the circulation.

(It is here admitted by counsel for the State that the Gazette has a large circulation in Tarrant county.)

NEWTON LASSITER testified as follows:

Have lived in the city four years and eight months; have heard a good many expressions from people in the city. Talk is
39 generally against the killing. From what I have heard, could not say that there is prejudice against the defendant; have heard many expressions, generally against him. It is possible that defendant could get a fair trial; possibly not. I would, if in his stead, rather be tried where nothing is known about it. Still I could not say that defendant could not have a fair trial. If the sentiment is the same in the country as in the city, would think it doubtful; do not know 100 people outside the city, and could not say that a jury could not be had in the county.

W. H. TAYLOR testified as follows:

Have heard a great deal said about the killing of Evans, and both in the city and county, but not much said about the defendant. What I have heard was in condemnation of the act; don't think there is any prejudice against the defendant; the expressions heard were in condemnation of the killing, not against the defendant personally. I was at a public meeting in Fort Worth, at the courthouse, to give expression of sentiment on the death of Mr. Evans. Evans did business throughout the country in every town of any

importance tributary to Fort Worth and not confined to Tarrant county. The meeting was held simply to give expressions of respect to him. I think there is no such prejudice against the defendant as would prevent him a fair trial. I presided over the meeting; remember the speech of Mr. Marple, and think it was applauded; there was no attempt to suppress the applause. My recollection of the context of the language quoted in the Gazette is that Mr. Marple was speaking of the loose manner in which the law was enforced. I am medium dealer in dry goods in Fort Worth, as a retailer, next to the B. C. Evans Company. The B. C. Evans Company was the largest dealers in Fort Worth at the time of Evans' death. B. C. Evans was well known, but the defendant Davis was comparatively unknown at the time of the occurrence.

W. R. SAWYERS testified as follows:

Resided four years in Fort Worth; was present at a public meeting held in the city. From what I have heard, think there is some prejudice against the defendant; have heard several say that the defendant could get a fair trial. My opinion is there is no such prejudice as would prevent him having a fair trial; my belief is he could. I know of no combination against him; have heard some expressions favorable to the defendant, one that he was justifiable; don't think there is any change of public opinion from what it was at the time of the killing.

40 J. W. SPENCER testified as follows:

I am a wholesale and retail grocer in the city; have heard expressions from people of the city against the killing, but not against the defendant; don't know that there is any prejudice against the defendant, but merely condemnation of the killing; don't think there is any prejudice to prevent a fair trial; never heard of any combination against him; think he could have a fair trial.

C. B. REYNOLDS testified as follows:

Have heard some talk, all condemning the killing; think there was a great deal of feeling aroused by the killing. My acquaintance in the county is limited. I don't think there is any prejudice against the defendant personally; all expressions heard by me were in condemnation of the killing; they were heard at the time of the killing; feeling seemed to have died out; have since heard very little talk about it.

J. H. MADDOX, recalled, testified as follows:

Have travelled over the county, particularly the southeastern portion and in the vicinity of Mansfield; heard expressions to the effect that defendant's neck should be broken.

EUGENE PENDERLY testified as follows:

Merchant in the city for eight years, firm of Pendery Brothers;

have heard a great deal of talk of the killing; expressions in every instance are against the defendant; he might have a fair trial, but think it impossible. My opinion is based on expressions of the city residents; my acquaintance limited to the city principally; have heard some expressions from people on the outside of the city; don't know as to the sentiment outside of the city; expressions heard were principally from city people; heard but very few from county speak of it.

CALVIN SPEAR testified as follows:

Reside in the northeast part of the county, on the Denton county line. Public sentiment in that part of the county is against the defendant. I know nothing as to the rest of the county. There are good men in my neighborhood; those I talked with are against the defendant. I don't know about personal feeling against the defendant, and nothing favorable to him; have heard a great many speak of the killing; don't know about public sentiment except in my neighborhood; the county line divides my house, and I trade at Roanoke, in Denton county; know of no combination existing against the defendant whatever; did not mean when I made the affidavit in this case that there was a dangerous combina-
41 tion; know nothing of any, and know nothing of any prejudice against the defendant in any part of the county except my immediate neighborhood. I am 47 years old.

HENRY FINCH testified as follows:

Have resided in the city seven years; am an attorney; have some acquaintance in different parts of the county; have heard this case frequently talked of. Expressions, so far as I know, are against the defendant. My opinion, if based alone on expressions heard, would be that defendant could not get a fair trial. I can't say that there is any such prejudice as would prevent a fair trial. There might be such bias as would prevent him getting a jury that would not be influenced—that is, some member of the jury might be prejudiced; have heard very little expression from the country people.

FRANK SMITH testified as follows:

Have heard a great many express themselves as to the killing of Evans, from the city and the country. Expressions heard *was* against the defendant. I think there is a prejudice existing against him, and I don't think that defendant could get a fair trial in Tarrant county.

A. J. CHAMBERS testified as follows:

Resided here 30 years; my acquaintance extensive; was not in Fort Worth at the time of the killing; been absent most of the time since; heard but little talk about it here; heard more of it in Erath and Comanche counties. What I heard has been simply in condemnation of the act of killing. But few people know Davis.

Evans was a prominent citizen. I have been in office in Tarrant county several years. I think any man can have a fair trial in this county and do not think there is such prejudice against the defendant as to prevent him a fair trial. I have been at home three or four weeks.

J. W. SWAYNE testified as follows:

Lawyer by profession for the last 12 years; have heard a good deal of talk, both from the city and county; all of it against the killing; do not think there is such prejudice against the defendant as to prevent a fair trial; know of no combination against the defendant; on the contrary, think the general feeling is that he could have a fair trial; have never heard of the corporations of which deceased was a member doing anything against defendant; have heard that Williams and Dryden, of the B. C. Evans Company, who are brothers-in-law of the deceased, had employed counsel to
42 prosecute the defendant. Dryden is the secretary and Williams now the president of the B. C. Evans Company. The Gazette has a large circulation. I think, however, that about half the people outside Fort Worth would go against any position taken by the Gazette; am a stockholder in the Gazette. The employés of the B. C. Evans Company corporation numbered about 80, including the Martin-Brown Company, of which deceased was a director.

W. R. HAYMAKER testified as follows:

Heard considerable talk about the killing of Evans; generally that the killing was wrongful; heard some talk on the streets about a mob somewhere. I might have been present when it was talked; do not think that such prejudice exists that would prevent a fair trial. There is no combination that I know of that would prevent it, and believe defendant would get as fair trial here as elsewhere.

G. W. GILLESPIE testified as follows:

Resided in Fort Worth eleven years; have heard a good deal of talk against the defendant, mostly by people of the city. I think almost any man could get a fair trial in Tarrant county; don't think that there is such prejudice as to prevent a fair trial in Tarrant county, and know of no combination to prevent such. If all the people were like the ones I have heard speak, he could not get a fair trial.

SAM. FARMER testified as follows:

Am city marshal; have heard a great deal of talk about the killing of Evans. There is a good deal of feeling against it; am inclined to think that the defendant could have a fair trial in this county. Expressions that I have heard are not against the defendant personally but against the act of killing, many speaking favorably of the defendant.

W. D. L. BORUM testified as follows:

Practicing attorney. There was a great deal of excitement at the time of the killing, but it is now quieted down. People seem to condemn the act. Many express sympathy for the defendant personally. I could not say that defendant could not get a fair trial; think a jury of 12 men could be had, and know of no prejudice to prevent it.

S. D. RAINEY testified as follows:

Cashier of the Farmers' and Mechanics' National Bank. Deceased was a stockholder and director in the bank. The directors held a meeting on the death of Evans and passed resolutions of respect; don't think there is any prejudice to prevent a fair trial, or any combination against him to prevent it; have heard but little talk about it.

43 *Newspaper Publications.*

The defense here introduced an article published in the Fort Worth Evening Mail of July 8th, 1889, entitled "I," which is as follows:

"I."

A prominent and a useful citizen of Fort Worth sleeps in an untimely grave because of the consuming egoism of an employé. "I" have been reprimanded for dissipation. "I" have been subordinated to some one of lesser ability than myself. "I" am not to be imposed upon. The offender against the imperial "I" must die. We would not willingly intensify the public feeling against the assassin of B. C. Evans, but from the awful result of his wretched phantasy a lesson is to be drawn that needs to be deeply impressed upon the hearts of the people. Nine-tenths of the crimes against life and property are the culmination of lawless egoism. I am a law unto myself. No man can trespass upon me and violate what I conceive to be my rights without physical hazard. Such is the popular creed. Each insists that the law shall judge for his neighbor. How many are contemptuously indifferent to law when they themselves are concerned? Our morning contemporary, like many thoughtless critics, ascribes the responsibility for Saturday's murder to the juries who have let criminals go unpunished. Such verdicts are the national output of the popular idea that each man is his own guardian and protector. Saturday's deed was an aggravated type of that disease. The man who assassinated his employer because that he fancied that his employer was not giving proper recognition to his abilities got his cue, perhaps, from the man who avenged himself against a real aggressor. The despot "I" needs but little to fan his fury to its highest pitch and discovers insults in ordinary actions. For all of this there is a remedy; it is to teach men that no "I" is higher than the law, and that when it speaks every voice must be silent. Whoever usurps its functions or invades

its precincts should be crushed as by the car of Juggernaut, and the sympathy of public-minded people should not be strong enough to shield him. When the law and public opinion have taught the egoists that "I" is an inconsequential person whom the law will hang or send to the penitentiary as quickly as any one else there will be less of assassination and less violation of personal rights in Texas.

44 The defense also introduced the following article, entitled "The public as an accomplice," published in the Fort Worth Evening Mail of July 8th, 1889, to wit:

The Public as an Accomplice.

"When the murderer of Evans estimated his punishment at eighteen months in jail he cast no reflection upon the law or the judiciary, for the law provides a penalty for murder and the judiciary charges the law; nor did reflection attach to a jury, for there is no jury in his case. He simply gave his opinion of the state of public sentiment in this community, and he concludes that the predominant sentiment of the people will prevail with that jury. In other words, the slayer of Mr. Evans asserts that it is true that in Texas a human life is popularly rated as of inconsequential importance. His case as stated by himself makes him a murderer, because his employer's estimate of himself and his own estimate did not agree. He says that Texas opinion condones a murder for such affront. He proved his faith in that opinion by a deliberate and carefully planned murder. It is an evasion of responsibility for men to look to the courts and to juries for the prevalence of such fantastic and dangerous notions. The evil is with the public. Its calamitous result to Fort Worth and a Fort Worth home makes candor a duty. Who does not know that we as a people do not rate human life at its proper value; that public sentiment tolerates, if it does not approve, the conduct of men in avenging their own affronts rather than submitting them to lawful arbitration when the natural consequences of such conduct is murder? What candid man will deny that to a dangerous extent we act upon the theory that each man is a law unto himself? To be sure it is not every day that men are assassinated, as was B. C. Evans, for an imaginary grievance, but what day is it that the principle of individual superiority to law is not definitely asserted in Fort Worth? The murder of Mr. Evans was simply the exag-erated expression of a deep disease, a fanciful idea of personal rights. When that is abandoned men, in deliberating a murder, will recognize in it the hazard, as in treason, rape, or arson. Men will be hung legally and their apologies will be considered afterwards. When the public is disposed to murder, against juries and the law, let it remember that it is not often that the public demands a blood atonement without a legal forfeiture of the life of the criminal. It called for the head
45 of Guiteau, and Guiteau was hung; it demanded the life of Mrs. Surratt, and it was given; it condemned Hawes, and his leading counsel said to the writer of this that the only question with

the jury was which should hang—Hawes or the jury. It is public indifference to murder that promotes murder. The direct agent in the crime is not guiltier than the public."

The defense also here introduced the following article, commencing "What is the responsibilities of Texas juries," published in the Fort Worth Gazette of July 7th, 1889, to wit:

"What is the responsibilities of Texas juries and a morbid public sentiment for the cruel deed that was perpetrated yesterday? A wife and child made widow and orphans, an aged mother bowed in shame and sorrow unspeakable, a young man made criminal, a good man murdered, a town robbed of one of its staunchest pillars; and why is all this? Let the unpunished murder-s of the past tell why."

The defense also here introduced the following article, headed "A terrible blow," published in the Fort Worth Gazette of July 7th, 1889, to wit:

A Terrible Blow.

"Never has Fort Worth been stunned and horror-stricken as it was yesterday afternoon, when eager-speaking people told the news of the murder of B. C. Evans. The man slain was of disposition so gentle and speech so mild that none could conceive how any one could kill him, and the thought of his gentleness turned to consideration of his usefulness to the community and the horror grew on all men and women in the city. It was a terrible deed and unaccountable. Widow and orphans weep; a city is stricken, and the juries of Tarrant and other Texas counties are responsible. The dreadful story is told in other columns of this paper, and well may all the people of this city feel that theirs is a common loss with the cruelly robbed wife and little ones. Fort Worth has cause for grief to-day."

The defense here also introduced the following article, headed "Is the law impotent," published in the Fort Worth Gazette of July 8th, 1889, to wit:

Is the Law Impotent?

"Why did conservative, cautious men talk of mob law on the streets of Fort Worth Saturday afternoon? Why did lawyers, who are usually the most guarded of all men, proclaim boldly the law's inadequacy to deal with murder in Texas? Why did the man who deliberately shot B. C. Evans to death say that he might spend
46 eighteen or thirty-six months behind the bars for the bloody deed? Why did he not fear punishment commensurate with the awful crime? For answer go to the court record of Texas and Tarrant county. The law is the anchorage of society, and the voice of wisdom will ever be for its maintanance, but to command respect the law must be potent. It is powerless in Texas to protect the lives

of men. Is it made powerless by the people? B. C. Evans, the friend of the poor, the public-spirited citizen, the devoted husband and father, lies dead to-day because the juries of the people have so enforced the law that it has lost much of its terrors for murderers. J. W. Davis, a devoted son and quiet, peaceable man, is to-day confined in a felon's cell as a murderer and looks forward to brief confinement as punishment for a terrible crime because the juries of the people have so enforced the law that it has lost much of its terror for murderers. Nothing will return B. C. Evans to his loved ones and to the people he served; nothing will bring to the aged mother the pride and peace of which she was robbed on Saturday, but if all men in Texas had been taught respect for the law and dread of the law and that something more than a few months behind the bars was the penalty for murder B. C. Evans would be alive to-day and J. W. Davis would be a free man, respected, and the stay and support of the mother he loved so well. The people of Fort Worth have not far to look to find the cause of the confidence in the slayer of B. C. Evans that he 'might' have to endure a few months' imprisonment as a punishment for his deed."

The defence also introduced the following article, entitled "Public meeting to-night," published in the Fort Worth Gazette of July 9th, 1889, to wit:

"*Public Meeting To-night.*

All citizens asked to be at the court-house at 8.30 to take suitable action on the death of B. C. Evans. Owing to the fact that the court-room was not lighted up early enough last night and the short notice given it was decided to postpone the meeting of business men and citizens generally called to give proper expressions in regard to the death of B. C. Evans — to-night, at 8.30, at the district court-room. Every citizen who recognizes the worth of the man killed on Saturday is asked to be present. Some of the citizens to the call for this meeting are W. H. Taylor, M. A. Chambers, D. R. Malone, E. J. White, N. E. Grammar, Henry Dahlman, M. B. Loyd, E. B. Harold, S. B. Cantey, Jesse Jones, W. M. Lampton, Howard Tulley, W. T. Fakes, H. C. Edrington, W. G. Newby."

47 The defense here introduced a part of a marked article beginning with the head "An impressive meeting" and ending with the line "the sentiment of those present," as marked and published in the Fort Worth Gazette of July 10th, 1889, to wit:

An Impressive Meeting.

"Citizens assemble at the court-house to speak of B. C. Evans"—"Speeches made—A series of resolutions adopted unanimously—Travelling meet at Sulphur Springs."—"Some three hundred citizens of Fort Worth met at the court-house last night to express themselves in some suitable manner on the death of B. C. Evans. W. H. Taylor was elected chairmen and L. August secretary. Be-

fore taking the chair Mr. Taylor addressed the meeting in a feeling manner, paying a high tribute to the deceased. To do to others as you would have others do to you was the rule of Mr. Evans' life. He loved God and his neighbors as himself. He was a better Christian than three-fourths of those within the pale of the Church. Mr. W. R. Haymaker spoke of deceased from an intimate personal acquaintance of many years. On Saturday afternoon Mr. Evans had signed a petition he presented to him, probably the last time he signed his name. B. C. Evans was a gentleman and an honorable man. On motion of J. M. Hartsfield a committee of five was appointed to draft resolutions and submit them to the meetings, which resolutions were to be published in the Gazette and Mail. The chair appointed E. B. Harold, M. A. Chambers, J. M. Hartsfield, H. C. Edrington, and E. G. Senter. The committee retired. Judge L. N. Cooper, being called for, delivered a beautiful address, speaking feelingly of the deceased. Many were visibly affected. J. P. Nicks, being called for, spoke in eulogy of Mr. Evans. He said while they were speaking the truth of Mr. Evans and his goodness they would not help thinking of the man who had caused his death. Col. D. L. Malone told of the kindness of the deceased when business troubles overtook him and how Mr. Evans had come to his relief. J. W. Putman spoke feelingly of deceased. W. R. Sawyer made a brief address, saying if by giving his right arm he could bring B. C. Evans back he would willingly sacrifice it. F. M. Marple made an eloquent speech, closing with the remark that had it been the custom to deal with such cases promptly and had the slayer known that in a week from the time he slew Mr. Evans justice would be meted out the killing would not have occurred. A storm of applause showed he expressed the sentiment of those present."

48 After which the defense closed its evidence in support of the motion to change the venue, and the State introduced no evidence; the court overruled said motion to change the venue, to which the defendant excepted and reserved this his bill of exception, which is approved, and I certify that this bill of exception contains all the evidence offered on the hearing of said motion to change the venue.

R. E. BECKHAM, *Judge.*

Filed October 21st, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exception No. 4. *Filed Oct.* 26, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the trial of the above cause the defendant at the propor time presented his application, duly sworn to and filed, to continue said cause to the next term of court; which motion

for continuance was by the court overruled; to which the defendant excepted and reserved this bill, which is approved.

R. E. BECKHAM, *Judge.*

Filed October 26th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exception No. 5. *Filed Oct.* 9, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Be it remembered that on the trial of the above-entitled cause B. F. Prickett, being called as a juror and being examined as to his qualifications as such, having answered that from hearsay he had formed an opinion as to the guilt or innocence of defendant, but that it would not influence him in finding a verdict, was
49 thereupon asked if he did not have an opinion, and replied that he did. He was then asked by defendant's counsel "if it would require evidence to remove that opinion," to which he replied "it would;" whereupon said Prickett was challenged by defendant for cause; and thereupon said Prickett was further interrogated by the court, and answered that he had not conversed with the witnesses in this case nor with persons professing to detail the facts; 2, that he had now an opinion from hearsay; 3, that the opinion he now had would not in any manner influence him in finding a verdict; 4, that if taken as a juror he could render an impartial verdict on the evidence on the trial, regardless of that opinion; 5, that what he had heard had not produced in his mind any feeling or bias for defendant or prejudi*as* or feeling against him; and thereupon the court overruled defendant's challenge and held said Prickett to be a competent juror, to which defendant; by his counsel, excepted.

R. E. BECKHAM, *Judge.*

Filed October 9th, 1889.

L. R. TAYLOR, *Clerk.*

Defendant's Bill of Exception No. 6. *Filed Oct.* 9, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Be it remembered that on the trial of the above cause the juror P. G. Davis, being upon his examination upon his *voire dire* as a juror, answered that he had heard the killing of Evans talked of by several parties since the killing occurred and had read accounts of it in the newspapers, and that from what he read he had formed in his mind the opinion that a man by the name of Davis killed B. C. Evans, and that that conclusion was now fixed in his mind, and that it

would require evidence to remove it, but that said juror had not formed any opinion as to the guilt or innocence of the defendant as to crime charged against him; upon which defendant challenged said juror for cause, and, being further examined by the court, said juror said that the opinion which he had just said that he had
50 formed would not in any manner influence him in finding a verdict, and that he had no bias or prejudice in favor of or against defendant from any cause; upon which the court overruled said challenge for cause, and defendant challenged said juror peremptorily and excepted to the ruling of the court. The juror further said that if taken as a juror he thought he could render a fair and impartial verdict according to the evidence adduced, regardless of any opinion which he had formed, and that he had not talked with witnesses or others professing to give the facts as to the killing.

R. E. BECKHAM, *Judge.*

Filed October 9th, 1889.

L. R. TAYLOR, *Clerk.*

Defendant's Bill of Exception No. 7. Filed Oct. 9, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the trial of the above-entitled cause J. A. Stewart, having been called as a juror and being examined touching his qualifications as such, stated that he had heard the killing of B. C. Evans talked about, and from what he had heard he had formed no opinion as to the guilt or innocence of defendant, but that he had formed the opinion that defendant had killed Evans from what he had heard, and that it would take evidence to remove that opinion, and thereupon the defendant challenged said juror for cause; whereupon said Stewart was further interrogated by the court as to his qualifications, and answered, 1, that he had not conversed with any of the witnesses in this case nor with parties who professed to give the facts of the killing; 2, that he did not now have any opinion as to whether or not defendant was guilty or innocent of the charge against him, but, from the talk he had heard, had the opinion that defendant killed Evans; 3, that if taken as a juror he could render an impartial verdict upon the evidence on the trial, regardless of that opinion; 4, that said opinion would not in any manner influence him in finding a verdict; 5, that what he had heard
51 had not in any manner produced in his mind any feeling or bias in favor of defendant nor any feeling or prejudice against him. Whereupon the court overruled defendant's challenge for cause; to which the defendant, by counsel, excepted.

R. E. BECKHAM, *Judge.*

Filed October 9th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exception No. 8. *Filed Oct.* 9, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Be it remembered that on the trial of the above cause J. R. Brown, being now examined by defendant on his *voire dire* as a juror, announced that he lived in the city of Fort Worth, and that he resided here at the time if the killing of B. C. Evans, and that he had heard the matter talked about by several people since; that he had formed no opinion as to the guilt or innocence of the defendant Davis as to the charge against him in this case; that he had, from what he had heard, an opinion as to whether the defendant is the man who killed said Evans and that he now has such opinion, and that it would require evidence to remove it; upon which the defendant challenged the juror for cause; upon which, being examined by the court, said juror answered to the court that what he had heard and read about the matter had not created any feeling or bias in his mind in favor of defendant nor any feeling or prejudice against him, and that he had none now, and that the opinion which he had formed would not in any manner influence him in finding a verdict; upon which the court overruled the defendant's challenge for cause; to which defendant excepted, and then challenged said juror peremptorily. The juror further stated that he had not talked with any witnesses or other persons who professed to know the facts and had not heard the particulars, and that if taken as a juror he would render an impartial verdict according to the evidence on the trial, regardless of what he had heard or any opinion he now had, and that he had no opinion from what he had heard other than that Evans
52 had been killed by defendant.

R. E. BECKHAM, *Judge.*

Filed October 9th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exception No. 9. *Filed October* 8, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Be it remembered that on the trial of the *trial of the* above-entitled cause and upon the empaneling of a jury to try said cause A. McVeigh, having been called as a juror, was asked by the defendant's counsel whether or not he had made up his opinion, and, if he had, whether or not it would require evidence to remove or change his opinion, and the juror answered "that it would" and that his mind was made up from what he had heard; whereupon said juror was by the defendant challenged for cause; and thereupon said juror

was asked by the court if that opinion would influence him in finding a verdict, to which he replied it would not, but I formed an opinion from what I heard and without evidence would still have that opinion. He was then asked "if he was upon leaving the stand called upon to say whether or not he believed the defendant guilty or innocent he could without hesitation answer yes or no," to which he replied, "No; he thought not." He was then asked by the court if, notwithstanding what he had heard, he could, if taken as a juror, render an impartial verdict upon the law and the evidence given by the witnesses, regardless of what he had heard, to which he replied he could; that he would be governed by the evidence; and the court held that he was qualified and overruled defendant's challenge; to which defendant excepted.

R. E. BECKHAM, *Judge.*

Filed October 8th, 1889.

L. R. TAYLOR,
District Clerk.

53 *Defendant's Bill of Exception No.* 10. *Filed Oct.* 11, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that upon the trial of the above-entitled cause, after the special venire, which had been exhausted without procuring a single juror, the judge presiding ordered the sheriff to summon two hundred men as talesmen, out of *which* a jury might be obtained. The judge did not give to the sheriff or any of his deputies any instructions with reference to what character of men he should summon, nor did the judge administer any oath to said officer or officers such as is required by law, said oath being in language as follows: "You do solemnly swear that you will, to the best of your ability and without bias or favor towards any, summon such persons as may be ordered by the court; that you will select none but impartial, sensible, and sober men, having the qualifications of jurors under the law; that you will not, directly nor indirectly, converse or communicate with any juryman touching any case pending for trial, and that you will not by any means attempt to influence, advise, or control any juryman in his opinion in any case which may be tried by him, so help *me* God." To all of which defendant excepts and tenders this his bill of exceptions. The sheriff and his deputies directed to summon jurors were sworn before the case was called for trial, on the morning the State docket was called for trial, having administered to them the oath required by law, and were instructed as to the qualifications of jurors to be summoned in all cases, and in directing the summoning of talesmen in this case the sheriff was again cautioned and instructed to summon only such persons as jurors who were qualified under the law, and no objection was made until all the jurors summoned and not excused had been examined and passed upon by the State and defendant; but

neither the sheriff or his deputies were sworn, after this case was called, until after the 200 first ordered were summoned and examined and the foregoing exception made.

R. E. BECKHAM, *Judge.*

Filed October 11th, 1889.

L. R. TAYLOR,
District Clerk.

54 *Defendant's Bill of Exception No.* 11. *Filed Nov.* 9, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the 28th day of October, 1889, the defendant's motion for new trial having been regularly called for hearing, the defendant, by counsel, moved to postpone the hearing of said motion for another week (two weeks having elapsed after the conclusion of the trial), based on statements alleged to have been made to defendant's counsel by one J. C. Young; and, on objection of attorney for the State, the court refused to postpone the hearing of said motion for the week, but set the hearing thereof for the following Wednesday, October 30th, to which time the same was postponed, the court being of the opinion that the time allowed was ample in which to procure the affidavits desired by defendant; to which defendant, by counsel, excepted.

R. E. BECKHAM, *Judge.*

Filed Nov. 9th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exception No. 12. *Filed Nov.* 9, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the hearing of the defendant's first amended motion for new trial in the above cause Mr. H. M. Furman, of counsel for the prosecution, offered in evidence, in opposition to said motion for new trial, the affidavit of J. C. Young, marked No. 3; the affidavit of J. W. Damron, marked N-. 6; the affidavit of H. Mosely, marked No. 7; the affidavit of Gordon, marked No. 8; the affidavit of D. F. Wilson, marked No. 4; and the affidavit of H. Furman and G. W. Finger, marked No. 10, as now upon file in this case; to all of which affidavits the defendant objected on the grounds that the matters contained in said affidavits state no facts that tend to disprove any matter averred in the defendant's motion for new trial, and that said affidavits were irrelevant, immaterial, and incompetent as offered against defendant's

motion for new trial. The above bill this day presented and
55 is correct, with this -planation, that the affidavit of J. C. Young was offered by the State for the purpose of controverting defendant's application for a postponement of the hearing of his original motion for new trial, defendant's counsel asking for further time than was allowed by the court, said application being heard on alleged statements of said Young.

R. E. BECKHAM, *Judge.*

Filed November 9th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Bill of Exception No. 13. *Filed Nov.* 9, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the hearing of the defendant's first amended motion for new trial in this cause on the 30th day of October, 1889, Mr. H. M. Furman, of counsel for the prosecution, offered to read in evidence the affidavits of one Dunk Grant and S. M. Farmer in opposition to defendant's first amended motion for new trial; to which the defendant objected, upon the ground that said affidavits were irrelevant, immaterial, and not competent or admissible as against defendant's motion for continuance, and on the ground that the allegations of said affidavits do not attack the diligence of defendant as set out in his motion for continuance, and are therefore incompetent; which objections were by the court overruled, upon which said affidavits were read in evidence by the State; to all of which defendant excepted and presented this his bill, which is approved.

R. E. BECKHAM, *Judge.*

Filed November 9th, 1889.

L. R. TAYLOR,
District Clerk.

56 *Defendant's Bill of Exception No.* 14. *Filed Nov.* 9, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Be it remembered that on the trial of the above-entitled cause the counsel for the State, in his closing argument to the jury, used the following language: "Now, gentlemen, you remember the attack of Mr. Johnson (defendant's attorney) on Mr. McLaury's testimony. You have the sworn testimony of the witness and the unsworn testimony of the attorney. No one would have any trouble in decid-

ing which of them to believe." To which remarks of counsel defendant's attorney at the time excepted.

R. E. BECKHAM, *Judge.*

Filed November 9th, 1889.

L. R. TAYLOR.
District Clerk.

Defendant's Bill of Exception No. 15. *Filed Nov.* 21, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Be it remembered that on the trial of the above cause, after the challenge for cause to the jurors mentioned in the defendant's bills of exception Nos. 5, No. 6, No. 7, No. 8, and No. 9 were overruled, the defendant challenged each one of said jurors peremptorily; and the court further certifies that the defendant had exhausted his peremptory challenges before the juror W. B. Freeman was offered as a juror in this cause, and this certificate is approved. The above presented to me, but no objection was urged against the juror Freeman, the only juror taken after defendant had exhausted his peremptory challenges, but he was accepted without objection or exception. On request of defendant's counsel, however, I now state that the defendant did peremptorily challenge the jurors mentioned in bills of exception Nos. 5, 6, 7, 8, and 9, and that he had challenged twenty jurors previously, before the juror Freeman was called.

R. E. BECKHAM, *Judge.*

Filed November 21st, 1889.

L. R. TAYLOR,
District Clerk.

57 *Defendant's First Amended Motion for New Trial. Filed Oct.* 30, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } Defendant's First Amended Motion for New Trial.

Comes now the defendant in the above cause and, by leave of the court, files this his first amended motion for new trial in lieu of his original motion for new trial, styled and numbered as of this cause and filed on the 14th day of October, 1889, and moves the court to grant him a new trial in this cause on the following grounds:

1. Because he says the court erred in overruling the defendant's motion to quash the special venire in this cause for the reason that the court ordered a special venire of one hundred (100) jurors from which to select a jury for the trial of defendant in this cause, whereas less than one hundred jurors were drawn upon said venire, which is fully shown by said order for the special venire, now of record in

this cause, which is here referred to and made a part of this motion; and by the original venire as drawn and issued and furnished to the sheriff and now on file in this cause, which is also referred to and made a part of this motion, *and* that the name of W. H. Percy — twice written in the list of names attached to said venire as made out by the clerk, said W. H. Percy as twice named in said special venire being one and the same man.

2. Because the court erred in overruling defendant's exception to the State's counter-affidavit, filed for the purpose of controverting the allegations of the defendant's motion to change the venue, because said counter-affidavit does not negative the means or information or impugn the character for veracity of each one of the defendant's compurgators, and because said counter-affidavit does not directly and positively aver that there was not at the time of the trial of this cause a dangerous combination against the defendant in Tarrant county, instigated by influential persons, by reason of which defendant could not expect a fair trial in Tarrant county.

3. Because the court erred in overruling the defendant's motion to change the venue of this cause, said motion being fully sustained by the defendant's affidavits and testimony in support of said motion and the State offering no evidence in opposition to said motion.

58 4. Because the court erred in overruling defendant's application for a continuance, based on the absence of the testimony of the defendant's witnesses named in said motion for continuance.

5. Because the court erred in overruling the defendant's challenge for cause interposed against the juror B. F. Prickett, as shown by bill of exception No. 5.

6. Because the court erred in overruling the defendant's challenge for cause interposed against the juror P. G. Davis, as shown by bill of exception No. 6.

7. Because the court erred in overruling the defendant's challenge for cause offered against the juror J. A. Stewart, as shown by bill of exception No. 7.

8. Because the court erred in overruling the defendant's challenge for cause preferred against the juror J. R. Brown, as shown by bill of exception No. 8.

9. Because the court erred in overruling the defendant's challenge for cause protesting against the qualification of the juror A. McVeigh, as shown by bill of exception No. 9.

10. Because the court erred in omitting to administer the oath required by law to the sheriff and his deputies before the panel of 200 talesmen, summoned after the special venire was exhausted, were summoned in this case, as shown by bill of exception No. 10.

11. Because the court's action in overruling defendant's challenges for cause to the jurors named in said bills of exception compelled defendant to exhaust his peremptory challenges, which resulted in injury to the defendant, in this: That before the juror W. B. Freeman was offered as a juror in this case the defendant had exhausted his peremptory challenges and could not challenge said juror perem-to-

rily; that said juror testified on his *voire dire* that he had resided in the city of Fort Worth several years; that he resided in said city at the time of the occurrence of homicide charged against the defendant, and that he resided in said city at the time of the trial of this cause; that he, said juror, was well acquainted with the deceased, B. C. Evans, but that he was not acquainted with the defendant Davis, all of which facts were true; that said juror, W. B. Freeman, also testified that he had formed no opinion as to the guilt or innocence of the defendant, which evidence rendered said juror, Freeman, not subject to challenge for cause. Defendant further says that said juror, W. B. Free-
59 man, has for several years been engaged in business in the city of Fort Worth, within one block of the business house and office of the deceased, B. C. Evans, and had had frequent business dealings with said Evans; that said juror was intimately acquainted with and on friendly terms with a large number of the people of the city of Fort Worth, among whom great excitement and prejudice has existed against the defendant ever since the killing of the deceased, Evans, as shown by the testimony offerred in support of the motion to change the venue, and therefore that said juror would be more liable than a juror residing out of the city to be affected and influenced by the great public excitement and prejudice aforesaid existing among the people residing in the city of Fort Worth; that as long as defendant was entitled to a challenge he challenged all jurors residing in the city of Fort Worth, either peremptorily or for cause, as said jurors were put upon the defendant, and that said juror, W. B. Freeman, was the last juror accepted by the State and sworn to try said cause, and was the only member of said jury which tried said cause who resided in the city of Fort Worth, where the greatest of said public excitement and prejudice existed, and that on account of said circumstances defendant would have challenged said juror, W. B. Freeman, peremptorily had defendant not exhausted his peremptory challenges before said W. B. Freeman was offerred as a juror.

12. Because he says that when D. F. Wilson, one of the jurors who served upon the trial of this cause, was examined upon his *voire dire* by counsel for the State and counsel for the defendant said juror swore that he resided in the northwest part of Tarrant county, several miles distant from the city of Fort Worth, and that he had heard nothing about the killing of B. C. Evans; that he had never, from hearsay or otherwise, formed nor expressed any opinion whatever as to the guilt or innocence of the defendant, and that he, said juror, had not, from hearsay or otherwise, ever had any feeling or prejudice against the defendant on account of the killing of B. C. Evans, and that he, said juror, had not at the time of his examination any opinion as to the guilt or innocence of defendant as to the killing of B. C. Evans nor any feeling or prejudice against the defendant, from hearsay or otherwise, on account of said killing of said B. C. Evans; upon which, relying upon said answers of said juror and believing the same to be true, said juror was accepted
60 both by the State and by the defendant and was sworn and served as a juror in the trial of said cause, as is shown by the

certified list of said jury now of record in this case, which list is here reffer-ed to and made a part of this motion; all of which answers of said juror except as to his place of residence were then and there false and untrue, for that the said juror, Wilson, had prior to the trial of said cause heard the facts concerning the killing of B. C. Evans related, and had from having heard said facts related both formed and expressed an opinion as to the guilt of the defendant, J. W. Davis, and had prior to the trial of said cause related in the presence of various good and lawful men of Tarrant county that he had formed an opinion as to the guilt of defendant from what he had heard about the killing, and that the defendant, J. W. Davis, ought to be hanged on account of the killing of B. C. Evans; which said statements were made by said D. F. Wilson in the presence and hearing of Mr. R. J. Walker, a credible citizen of Tarrant county, prior to the trial of said cause, and that said statements in substance were also made by said juror, D. F. Wilson, in the presence and hearing of Mr. W. N. Mosely, a credible citizen of Tarrant county, during the trial of said cause and before the said D. F. Wilson was offerred or examined as a juror in said cause; all of which facts are fully shown by the affidavits of W. N. Mosely and J. R. Walker, hereto attached, marked Exhibits "A" and "B;" that none of said facts were known to the defendant nor his counsel until several days after the filing of the defendant's original motion for new trial in this cause; that at the time said juror, D. F. Wilson, was accepted and sworn as a juror in this cause the defendant had not exhausted his peremptory challenges, but had the power and the right by law to challenge said juror peremptorily, and that if the matters shown by said affidavits or either one of them had been made to appear by the answers of said juror on his *voire dire*, or had been known to defendant by any other means before said juror was accepted and sworn as a juror, the defendant would have challenged said juror for cause, and if said challenge had been overruled that defendant would then have challenged said juror peremptorily, but that by said false answers the defendant was deceived and entrapped by said juror, while said juror was in fact wholly disqualified as a juror in said cause, and hence that defendant had not had a fair and impartial trial.

61 14. Because he says the court erred in refusing to adjourn at the noon hour on the first day of the trial of this cause, upon the request of defendant's counsel, Senator S. C. Upshaw, in order to allow the defendant and his counsel time to get dinner and refreshments to enable them the better to endure the labor and fatigue of said trial, and because the court erred in allowing the defense only one hour in which to prepare and bring into court the defendant's application for continuance, because said work required the presence and aid of the defendant and all of his attorneys, and consumed the entire recess of one hour, which was taken by the court at the time the preparation of said application was ordered, whereby the defendant and his said attorneys were kept in court and at work from 9 o'clock in the morning until six o'clock in the even-

ing without food or refreshments, defendant's said attorney, S. C. Upshaw, being ill at said time.

15. Because he says that the court erred in holding a night session of the court after supper on the night of Friday, October 11th, 1889, for the purpose of the closing argument being made on the part of the prosecution, which closing argument commenced at half past seven o'clock at night and was concluded at half past 9 o'clock on that night, the defendant objecting to said night session on the ground that the closing argument for the prosecution by the able counsel employed to prosecute said cause, being delivered in the night time, in a brilliantly lighted court-house, while the whole people of the city were at leisure, after the business of the day, would be calculated to attract the presence of too large a concourse of people of the city in the court-house during the close of the prosecution of said cause, which would be calculated to create a wrong impression upon the jury as to the public sentiment regarding said trial and to increase the public excitement and terror already existing among the people on account of said case, as shown by the evidence adduced in support of defendant's motion to change the venue, and upon the further ground that the jury were tired and fatigued and needed the rest and sleep of the night to fit their minds and bodies for the patient and considerate deliberation the next day upon their verdict in this case, in which the defendant was on trial for his life.

16. Because the court erred in charging the jury and retir-
62 ing them to consider of their verdict in this case at the conclusion of the closing argument for the State at half past nine o'clock on said night of Friday, October the 11th, over the objection of the defendant upon the same grounds as stated in section fifteen of this motion.

17. Because when said jury came into court at 10 o'clock on said night and stated to the court that they could not return a verdict at that time the court erred in not withdrawing the papers of said cause from said jury until the next morning in order that said jury might rest and sleep during the remainder of said night and resume the consideration of their verdict on the next morning, the same being Saturday, no case having been tried on said last-named day, which would have allowed the whole of said day for the deliberation of said jury, and that the verdict of said jury was in fact not returned into court until 8 minutes after 10 o'clock on Saturday morning, October 12th, 1889, as shown by the clerk's accurately dated file-mark of said verdict, which is here referred to and made a part of this motion.

18. As a further ground of this motion defendant says that said night session of the court and the proceedings thereof caused the congregation of such a vast concourse of people in and about said court-house, in the hallways and entrance of the district court-room, and in the auditorium and aisles of said court-room and inside the bar docks and behind and inside the railing inclosing the clerk's desk and in the large double windows in part of the district court room and in the double windows in the rear of the judge's stand, both sitting and standing up, that it was impossible for any other

person to enter any part of said court-room without the assistance of the officer of the court; that at the beginning of the proceedings of said night session one of the defendant's attorneys, attempting to enter the court-room, became blocked in the center of the main aisle leading from the front of the court-house through the court-room to the judge's stand, and could not proceed on account of the dense crowd standing in said aisle, and, being called for by the court in order that he might proceed, defendant's said attorney answered from the crowd that if the court could afford counsel any means of getting through the crowd that counsel would come to the bar of the court, upon which the judge on the bench ordered the
63 crowd to stand back and allow counsel to proceed to the bar, which, with some effort, the crowd obeyed; that the main body of said crowd remained standing in said court-room while the jury were out considering of their verdict until the judge of the court, at request of defendant's counsel, dismissed the crowd, telling them that no verdict would probably be returned by the jury on that night, upon which the greater part of the crowd left the court-room; that said concourse of people was composed almost exclusively of citizens of the city of Fort Worth, among whom were many of the nicest and best people of the city, who doubtless attended said trial through the purest motives and most innocent intentions, but the defendant avers that the very presence and attendance of such an immense crowd of city people at said night session, when nothing else could be seen or heard but the prosecution of defendant, was calculated to prejudice the defendant in his trial by impressing the jury with the idea that the prosecution was the popular side of said case, and that said vast throng of people, being almost exclusively from the city, was calculated to stir up and increase the great public excitement that was already existing on account of said case, as shown by the evidence adduced by defendant in support of his motion to change the venue.

19. Because, also, that the court erred in failing to instruct the jury upon the law of murder in the second degree as applicable to the issues legitimately deducible from the evidence and theory of the defense in this case.

20. Because defendant says the court erred in failing to instruct the jury upon the law of manslaughter as applicable to the issues legitimately deducible from the evidence of the defense in this case.

21. Because the verdict is contrary to the evidence.

J. W. DAVIS,
The Defendant.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, the undersigned authority, this day personally appeared J. W. Davis, the defendant in the above cause, who, being by me duly sworn, deposes and says that the facts stated in sections one (1) and thirteen (13) of the above and foregoing motion for new trial are true according to the best of his information and belief, and

that the facts stated in section 11, section 12, section 14, sec-
64 tion 15, section 16, section 17, and section 18 of said motion for new trial are true.

J. W. DAVIS,
The Defendant.

Subscribed and sworn to before me this October 30th, 1889.
L. R. TAYLOR, *Dist. Cl'k.*

(EXHIBIT "A" Attached to Motion for New Trial.)

Affidavit of J. R. Walker.

STATE OF TEXAS
vs.
J. W. DAVIS. } "A."

Before me, the undersigned authority, personally appeared J. R. Walker, who, being duly sworn, deposes and says that he was present & heard a conversation in which the juror D. F. Wilson, who sat upon the trial of the above cause, stated that if what he had heard about the killing was true that the defendant, Davis, ought to be hung. This conversation occurred prior to said trial.

J. R. WALKER.

Subscribed and sworn to before me this 28th day of October, A. D. 1889.

J. H. SNODGRASS,
[SEAL.] *Notary Public in & for Tarrant Co., Texas.*

(EXHIBIT "B" Attached to Motion for New Trial.)

Affidavit of W. N. Mosely.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } "B." Affidavit of W. N. Mosely.

Before me, the undersigned authority, this day personally appeared W. N. Mosely, who, being duly sworn, deposes and says that he was summoned as a talesman in the above cause during the formation of the jury in said cause, and that while said jury was being selected and prior to the completion of the panel and before the juror D. F. Wilson was examined as a juror in said cause affiant was present at a conversation in which said juror, D. F. Wilson, who served as a juror in said cause, stated in the presence and hearing of affiant that he, said D. F. Wilson, "was disqualified from serving on said jury, because he had formed an opinion as to the guilt or innocence of the defendant," and it is now the best of affiant's impression that said juror, D. F. Wilson, also then and there stated to affiant that he "had formed and expressed an opinion as to said matter,
65 and that the defendant ought to be hanged for the killing of Evans."

W. N. MOSELY.

Subscribed and sworn to before me this Oct. 29, 1889.

D. S. BROWN,
Not. Pub., Tarrant Co., Texas.

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

Order Overruling 1st Amended Motion for New Trial, Oct. 30, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. October 30th, 1889.

This day, this cause being called, the State appeared by her county attorney, and the defendant, J. W. Davis, in his own proper person, his counsel also being present; then came on to be heard defendant's first amended motion for a new trial herein, and, because it is the opinion of the court, after hearing the same and the argument of counsel thereon, and being fully advised in the premises, that the law is against the said motion, it is therefore considered, adjudged, and decreed by the court that said motion of defendant for a new trial in this cause be, and the same is hereby, overruled; to which ruling of the court defendant excepts and gives notice of appeal to the appellate court of the State of Texas.

Defendant's Second Amended Motion for New Trial. Filed Nov. 11, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } Defendant's Second Amended Motion for a New Trial.

Comes now the defendant in the above cause and, leave of the court to amend heretofore had, files this his second amended motion for new trial in amendment of his original and his first amended motion for new trial, styled and numbered as of this cause and filed respectively on the 14th and 30th days of October, 1889, which are here referred to as a part of this motion, and prays the court to
66 grant him a new trial in this cause on the following grounds:

1. Because he says the court erred in overruling the defendant's motion to qu-sh the special venire in this cause for the reason that the court ordered a special venire for one hundred (100) jurors from which to select a jury for the trial of defendant in this cause, which is shown by said order, here referred to as part of this motion, whereas less than one hundred jurors were drawn upon said venire, which is fully shown by the writ of special venire, now of record in this cause, and which is here referred to and made a part of this motion, and that by said original writ of venire as issued and furnished to the sheriff by the clerk of this court said sheriff was directed and commanded to summon a less number of jurors than is designated in said order of the court, and because the name of W. H. Percy was twice written in the list of names at-

tached to said venire as made out by the clerk, said W. H. Percy so twice named in said special venire being one and the same man.

2. Because the court erred in overruling defendant's exception to the State's counter-affidavit, filed for the purpose of controverting the allegation of the defendant's motion to change the venue, because said counter-affidavit does not negative the means of information nor impugh the character for veracity of each one of the defendant's compurgators, and because said counter-affidavit does not directly and positively aver that there was not, at the time of this cause, "a dangerous combination against the defendant in Tarrant county, instigated by influential persons, by reason of which defendant could not expect a fair trial in Tarrant county."

3. Because the court erred in overruling defendant's motion to change the venue in this cause, said motion being fully sustained by the defendant's affidavits and testimony in support of said motion and the State offering no evidence in opposition to said motion.

4. Because the court erred in overruling defendant's application for a continuance, based on the absence of the testimony of the defendant's witnesses named in said motion for continuance.

5. Because the court erred in overruling the defendant's challenge for cause interposed against the juror B. F. Prickett, as shown by bill of exception No. 5.

6. Because the court erred in overruling the defendant's challenge for cause interposed against the juror P. G. Davis, as shown
67 by bill of exception No. 6.

7. Because the court erred in overruling the defendant's challenge for cause offered against the juror J. A. Stewart, as shown by bill of exception No. 7.

8. Because the court erred in overruling the defendant's challenge for cause preferred against the juror J. R. Brown, as shown by bill of exception No. 8.

9. Because the court erred in overruling the defendant's challenge for cause protesting against the qualification of the juror A. McVeigh, as shown by bill of exception No. 9.

10. Because the court erred in omitting to administer the oath required by law to the sheriff and his deputies before the panel of two hundred talesmen, summoned after the special venire was exhausted, were summoned in this case, as shown by bill of exception No 10.

11. That because of the court's action in overruling the defendant's challenges for cause to the jurors named in said bills of exception defendant challenged each one of said jurors peremptorily, which compelled the defendant to exhaust his peremptory challenges, which resulted in injury to defendant in this, that before the juror W. B. Freeman was offered as a juror in this case the defendant had exhausted his peremptory challenges and could not challenge said juror peremptorily; that said juror testified on his *voire dire* that he had resided in the city of Fort Worth several years; that he resided in said city at the time of the occurrence of the homicide charged against the defendant, and that he resided in said city at the time of the trial of this cause; that he, said juror, was well acquainted

with the deceased, B. C. Evans, but that he was not acquainted with the defendant, Davis, all of which facts were true; that said juror, W. B. Freeman, also testified that he had formed no opinion whatever as to the guilt or innocence of the defendant, which evidence rendered said juror, Freeman, not subject to challenge for cause. Defendant further says that said juror, W. B. Freeman, has for several years been engaged in business in the city of Fort Worth within one block of the business house and office of the deceased, B. C. Evans, and had had frequent business dealings with said Evans; that said juror was intimately acquainted with and on friendly terms with a large number of the people of the city of Fort Worth, among whom great excitement and prejudice has existed
68 against the defendant ever since the killing of the deceased, Evans, as shown by the evidence offered in support of the motion to change venue, and therefore that said juror would be more liable than a juror residing out of the city to be affected and influenced by the great public excitement and prejudice aforesaid existing among the people residing in the city of Fort Worth; that as long as defendant was entitled to a challenge he challenged all jurors residing in the city of Fort Worth, either peremptorily or for cause, as said jurors were put upon the defendant, and that said juror, W. B. Freeman, was the last juror accepted by the State and sworn to try said cause, and was the only member of said jury who tried said cause who resided in the city of Fort Worth, where the greatest of said public excitement and prejudice existed, and that on account of said circumstance defendant would have challenged said juror, W. B. Freeman, peremptorily had he not exhausted his peremptory challenges before said juror, W. B. Freeman, was offered as a juror.

12. Because he says that when D. F. Wilson, one of the jurors who served upon the trial of this cause, was examined upon his *voire dire* by counsel for the State and counsel for the defendant said juror swore that he resided in the northwest part of Tarrant county, several miles distant from the city of Fort Worth, and that he had heard nothing about the killing of B. C. Evans; that he had never, from hearsay or otherwise, formed nor expressed any opinion whatever as to the guilt or innocence of the defendant, and that he, said juror, had not, from hearsay or otherwise, ever had any feeling or prejudice against the defendant on account of the killing of B. C. Evans, and that he, said juror, had not at the time of his said examination any opinion as to the guilt or innocence of defendant as to the killing of B. C. Evans, nor any feeling or prejudice against the defendant, from hearsay or otherwise, on account of said killing of B. C. Evans; upon which, relying upon said answers of said juror and believing the same to be true, said juror was accepted both by the State and by the defendant, and was sworn and served as a juror in the trial of said cause, as is shown by the certified list of said jury now of record in this case, which list is here referred to and made a part of this motion; all of which answers of said juror, except as to his place of residence, were then and there false and untrue, for that the said juror, D. F. Wilson, had, prior to the trial of said cause, heard the facts concerning the

killing of B. C. Evans related, and from having heard said
69 facts related both formed and expressed an opinion as to the guilt of the defendant, J. W. Davis, and had, prior to the trial of said cause, stated in the presence of various good and lawful men of Tarrant county that he had formed an opinion as to the guilt of defendant from what he had heard about the killing, and that the defendant, J. W. Davis, ought to be hanged on account of the killing of B. C. Evans, which said statements were made by said D. F. Wilson in the presence and hearing of Mr. J. R. Walker, a credible citizen of Tarrant county, prior to the trial of said cause, and that said statements, in substance, were also made by said juror, D. F. Wilson, in the presence and hearing of Mr. W. N. Mosely, a credible citizen of Tarrant county, during the trial of said cause; all of which facts are fully shown by the affidavits of W. N. Mosely and J. R. Walker to defendant's 1st amended motion for new trial, marked Exhibits "A" and "B," and which are here referred to and made a part of this motion; that none of said facts were known to the defendant nor his counsel until several days after the filing of the defendant's original motion for new trial in this cause; that at the time said juror, D. F. Wilson, was accepted and sworn as a juror in this case the defendant had not exhausted his peremptory challenges, but had the power and right by law to challenge said jurors peremptorily, and that if the matters shown by said affidavits or either one of them had been made to appear by the answers of said juror on his *voire dire* or had been known to defendant by any other means before said juror was accepted and sworn as a juror the defendant would have challenged said juror for cause, and if said challenge had been overruled that defendant would then have challenged said juror peremptorily, but that by said false answers the defendant was deceived and entrapped by said juror, while said juror was in fact wholly disqualified as a juror in said cause, and hence that defendant has not had a fair and impartial trial.

13. That the city of Fort Worth is the county-seat of Tarrant county and is located in justice's precinct No. 1 of said county, and that J. C. Richardson is the sheriff of Tarrant county, and that ever since the 10th day of December, 1889, said sheriff has had working under him six (6) deputy sheriffs in said precinct No. 1, under written appointments duly executed and signed by said sheriff and filed and deposited in the office of the county clerk of said county, excepting
W. M. Rea, whose deputation and appointment was not filed
70 nor received in the county clerk's office until the 10th day of October, 1889, as shown by the county records of deputations and official bonds of Tarrant county, which are here referred to and made a part of this motion, and by a certified copy of each of said written appointments and the oath of office of each of said appointments, and which are hereto attached, marked Exhibits J, K, L, M, N, O, the names of said deputies thus appointed being as follows: W. L. Rushing, Joe Witcher, B. R. Elliott, J. H. Maddox, W. M. Rea, and W. T. Steele, all af whom were appointed in writing and duly sworn according to the statute, and that no lists of said appointments have ever been posted up in any place in the office of the

county clerk nor in the office of the district clerk of said county; that each and all of said deputies have their appointments as aforesaid in and for said precinct No. 1 and reside and have their place of business in said precinct No. 1, and that all of said appointments are in violation of article 4520, Revised Statutes of the State of Texas, as amended by an act of the 21st Legislature, approved April 6th, 1889, and are therefore all null and void; wherefore the return to the writ of special venire signed by W. M. Rea, as deputy sheriff of Tarrant county, is not the official act of the sheriff or a deputy sheriff of Tarrant county, and the defendant's motion to quash said venire should have been sustained, reference being here made to said return as a part of this motion.

14. Because he says that the court erred in refusing to adjourn at the noon hour on the first day of the trial of this case upon the request of the defendant's counsel, Senator S. C. Upshaw, in order to allow the defendant and his counsel time to get dinner and refreshments to enable them better to endure the labor and fatigue of said trial, and because the court erred in allowing the defense only one hour in which to prepare and bring into court the defendant's application for continuance, because said work required the presence and aid of the defendant and all of his attorneys and consumed the entire recess of one hour which was taken by the court at the time the preparation of said application was ordered, thereby the defendants and his said attorneys were kept in court and at work from 9 o'clock in the morning until six o'clock in the evening without food or refreshments, defendant's said attorney, Senator S. C. Upshaw, being ill at said time.

15. Because he says that the court erred in holding a
71 night session of the court after supper, on the night of Friday, October 11th, 1889, for the purpose of the closing argument being made on part of the prosecution; which closing argument commenced at half past seven o'clock at night and was concluded at half past nine o'clock on said night, the defendant objecting to said night session on the ground that the closing argument for the prosecution by the counsel employed to prosecute said cause being delivered in the night time, in a brilliantly lighted court-hose, while the whole people of the city were at leisure, after the business of the day, would be calculated to attract the presence of too large a concourse of people of the city in said court-room during the close of the prosecution in said cause, which would be calculated to create a wrong impression upon the jury as to the public sentiment regarding said trial, and to increase the public excitement and terrorism already existing among the people on account of said cause, as shown by the evidence adduced in support of defendant's motion to change the venue; and upon the further ground that the jury were tired and fatigued and needed the rest and sleep of the night to fit their minds and bodies for the patient and considerate deliberation the next day upon their verdict in this case, in which the defendant was on trial for his life.

16. Because the court erred in charging the jury and retiring them to consider of their verdict in this case at the conclusion of the clos-

ing argument for the State, at half past nine o'clock, on said night of Friday, October 11th, over the objection of the defendant, upon the same grounds as stated in section 15 of this motion.

17. Because when said jury came into court at 10 o'clock on said night and stated to the court that they could not return a verdict at that time the court erred in not withdrawing the papers of said cause from said jury until the next morning, in order that said jury might rest and sleep during the remainder of said night and resume the consideration of their verdict on the next morning, the same being Saturday, no case having been tried on said last-named day, which would have allowed the whole of this day for the deliberation of said jury, and that the verdict of said jury was in fact not returned into court until 8 minutes after 10 o'clock on Saturday morning, October 12th, 1889, as shown by the clerk's accurately dated file-mark of said verdict, which is here referred to and made a part of this motion.

72 18. As a further grounds of this motion the defendant says that said night session of the court and the proceedings thereof caused the congregation of such a vast concourse of people in and about said court-house, in the hallways and entrances of the district court room, and in the auditorium and aisles of the said court-room, and inside the bar dock, and behind and inside the railing inclosing the clerk's desk, and in the large double windows in front of the district court room, and in the double windows in the rear of the judge's stand, both sitting and standing up, that it was impossible for any other person to enter any part of said court-room without the assistance of the officers of the court; that at the beginning of the proceedings of said night session one of defendant's attorneys attempting to enter the court-room became blocked in the center of the main aisle, leading from the front of the court-house through the court-room to the judge's stand, and could not proceed on account of the dense crowd standing in said aisle, and, being called for by the court in order that the trial might proceed, defendant's said attorney answered from the crowd, that if the court could afford counsel any means of getting through the crowd that counsel would come to the bar of the court; upon which the judge on the bench ordered the crowd to stand back and allow counsel to proceed to the bar, which with some effort the crowd obeyed; that the main body of said crowd remained standing in said court-room while the jury were out considering their verdict, until the judge of the court, at request of defendant's counsel, dismissed the crowd, telling them that no verdict would probably be returned by the jury on that night, upon which the greater portion of the crowd left the court-room; that said concourse of people was composed almost exclusively of citizens of the city of Fort Worth, among whom were many of the nicest and best people of the city, who doubtless attended said trial through the purest of motives and most innocent intentions; but the defendant avers that the very presence and attendance of such an imme-se crowd of city people at said night session, when nothing could be seen or heard except the prosecution of defendant, was calculated to prejudice the defendant in his trial by impressing the jury with the idea that the prosecution was the pop-

ular side of said cause, and that said vast throng of people being almost exclusively from the city was calculated to stir up and increase the great public excitement that was already existing on account of said case, as shown by the evidence adduced by
73 the defendant in support of his motion to change the venue.

19. Because, also, that the court erred in failing to instruct the jury upon the law of murder in the second degree as applicable to the issue legitimately deducible from the evidence and the theory of the defense in this case.

20. Because defendant says the court erred in failing to instruct the jury upon the law of manslaughter as applicable to the issue legitimately deducible from the evidence of the defense in this case.

21. Because the verdict is contrary to the evidence.

22. Because the court, in his charge to the jury, failed to define the term "malice aforethought" as said term is used in the indictment and in the first clause of the charge of the court.

23. Because the court did not define, in his charge to the jury, the term "express malice," as distinguishable from "implied malice," thereby authorizing the jury to inflict the death penalty for a killing upon implied malice.

24. Because the court did not, in his charge to the jury, define the term implied malice.

25. Because the court, in charging the jury upon the law governing the defendant's right to act upon apparent danger, failed to instruct the jury that the appearance of danger must be judged of from all the attendant circumstances as viewed from the defendant's standpoint.

26. And in further support of defendant's assignment of error upon the action of the court in overruling defendant's motion to change venue, the defendant says upon oath that in the formation of the jury in this case the special jurors summoned by virtue of the original venire issued by the district clerk *was* entirely exhausted before a full jury was obtained, as also the jury for the week; after which the court ordered the sheriff to summon two hundred talesmen as special jurors in said cause, as shown by bill of exception No. 10, and that said list of two hundred talesmen, as to those who were present, were also exhausted before said jury was completed, after which the court ordered the sheriff to summon twenty talesmen for the completion of said jury, and that said list of twenty talesmen were also exhausted before said jury was completed, upon which the court ordered the sheriff to summon
74 twenty-five talesmen; and the juror W. B. Freeman, being first upon said last-named list of talesmen, having qualified as a juror on *voire dire* and the defendant having exhausted his peremptory challenges, said juror W. B. Freeman, was sworn in as the twelfth and last juror constituting the jury which tried this case.

27. And in further support of defendant's assignment of error stated in section 15 of this motion defendant says that the intro-

duction of the evidence in this case was begun at 9 o'clock in the morning of Friday, October 11th, 1889, and was closed at 3 o'clock in the afternoon of the same day, immediately after which the county attorney delivered the opening argument for the State; that defendant's attorney, Senator S. C. Upshaw, being too ill to argue the defendant's cause, only one argument was delivered in behalf of the defendant, which argument for the defendant was concluded at about half past five o'clock on the same afternoon, and that the night session of said court commenced at half past seven o'clock on the night of Friday, October 11th (the same day); that the charge of the court was delivered to the jury at half past nine o'clock on the same night, and the jury were then and there sent to the jury-room, in charge of an officer, to deliberate upon their verdict, the court still remaining in session, awaiting a verdict from said jury, until 10 o'clock on said night, at which hour the court had said jury brought back into court; and, being informed by said jury that they would return no verdict that night, the court left the papers and the case in the consideration and charge of said jury, and did not withdraw the same from their consideration until they returned their verdict, at 8 minutes after 10 o'clock the next morning, Saturday, October 12th, 1889.

28. By way of replication to the affidavits of S. M. Farmer and Dunk Grant and J. C. Young, filed and presented by the State, over defendant's objection, on the 30th day of October, 1889, in opposition to defendant's first amended motion for new trial, the defendant herewith files as part of this motion the affidavit of J. H. Gregory, the affidavit of W. O. Gregory, the affidavit of R. C. Woodall, the affidavit of Jeff. Daggett, and the affidavit of B. G. Johnson, marked Exhibits E, F, G, H, and I; that said affidavits were not presented on the hearing of defendant's amended motion for new trial herein because the same had not at that time been obtained and said affidavits of Farmer and Grant and Young not having been presented to the court until after defendant's first amended
75 motion for new trial had been submitted to the court by the defendant.

29. That the transcript in this case has not been finished nor filed in the court of appeals, and that the district court of Tarrant county still has jurisdiction over this cause, and court being still in session, wherefore defendant prays that this motion, with its references and exhibits, be considered and passed upon by the court and made a part of the record in this case, and that the court grant him a new trial herein.

J. W. DAVIS,
The Defendant.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, the undersigned authority, this day personally appeared J. W. Davis, the defendant in the above cause, who, being by me duly sworn, deposes and says that the matters of fact set forth and contained in the twelve sections, as follows, 1, 11, 12, 13,

14, 15, 17, 18, 26, 27, 28, and 29, of the above and foregoing 2nd amended motion for new trial in the case of The State of Texas *vs.* J. W. Davis are true.

J. W. DAVIS,
The Defendant.

Subscribed and sworn to before me by the defendant, J. W. Davis, this November 7th, 1889.

[SEAL.]

JNO. P. KING,
Cl'k Co. Ct, Tarrant County, Texas,
By H. A. VOLCK, *Deputy.*

Affidavit of R. C. Woodall.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, the undersigned authority, this day personally appeared R. C. Woodall, who, being by me duly sworn, deposes and says that he is a business man, residing and doing business in the city of Fort Worth, Tarrant county, Texas, and was such on the 6th day of July, 1889, and that affiant was in the city of Fort Worth at the time B. C. Evans was killed by the defendant, J. W. Davis. Affiant further deposes that he knows the witness J. E. Soloman, and that at the time of the trial of J. W. Davis for the killing of B. C. Evans said J. E. Soloman resided in Tarrant county, and that affiant believes that said witness still resides in Tarrant county.

Affiant further says that he saw said Soloman in the city of
76 Fort Worth just a few minutes after the killing of said B. C. Evans, late in the afternoon of July 6th, 1889; that a few minutes after said killing occurred affiant, who was then at his place of business, on Houston street, went over to Main street to learn what he could regarding the killing of Evans, and that affiant stopped at the corner of Second and Main streets, one block and a fraction of a block south from the place where B. C. Evans was killed, and stood there talking with some by-standers regarding the occurrence, when the witness J. E. Soloman came up from the direction of the spot where Evans was killed and joined in the conversation, and in the conversation stated that he was present and saw Davis kill Evans, and some one of us present asked said Soloman to tell us then how it occurred, upon which said J. E. Soloman made the following statement: He said that Davis and Evans were talking, and he heard Davis say something to Evans. He thinks he said, "You are a damned liar," and Evans replied to Davis, "You are a God damned liar," and advanced towards Davis with his hand thrown behind him, and that Davis then shot Evans, and that Evans was not sitting down when he was shot, but was on his feet, advancing towards Davis. Some one present said, "Why, they say Evans was shot while he was sitting down in his chair," and said Soloman says "That is not so, for I saw it all."

R. C. WOODALL.

Subscribed and sworn to before me this November 6th, 1889.

[SEAL.] D. S. BROWN,
Not. Pub., Tarrant County, Texas.

EXHIBIT "E."

Affidavit of J. H. Gregory.

THE STATE OF TEXAS, }
County of Parker. }

Before me, the undersigned authority, this day personally appeared J. H. Gregory, who, being by me duly sworn, deposes and says that he lives in Parker county, Texas, and that he went in a wagon, with W. O. Gregory, from his home to Fort Worth, Tarrant county, Texas, on the 6th day of July, 1889, and that late in the afternoon of that day affiant and W. O. Gregory camped on the road leading west from Fort Worth, in Tarrant county, between the white settlement and Fort Worth and east from the white school-house; that just before dark on that evening Dunk Grant, a colored man, riding on horseback and coming west from towards Fort Worth, stopped at our camp and spoke to us; that during the con-
77 versation Grant said that B. C. Evans was killed with a pistol in his store, at Fort Worth, that evening by one of the clerks in the store named Davis; that he, Grant, was just from Fort Worth, and that he then lived in Tarrant county, one mile west from the white school-house, and that he was then on his way home from Fort Worth, and that he had a brother-in-law in jail in Fort Worth for killing another negro. Affiant further says that he and W. O. Gregory afterwards went to the law office of B. G. Johnson, one of the defendant's attorneys, and stated to him the matters set forth in this affidavit; that during said conversation at our camp one of us asked Grant how it happened that Davis killed Evans, and he stated that he, Grant, was present at the time it occurred and saw and heard what passed between Davis and Evans, and he then gave the following account of the occurrence: He said, "I stepped to the door of B. C. Evans' house. I was going into the house. I heard B. C. Evans give Davis the damned lie. Davis passed the damned lie back to Evans. Evans then got up from his seat, saying to Davis, Davis, you can't call me a damned liar. At the same time Evans drew his hand from his pocket with what I supposed to be a spring knife, as he did not use but one hand to open the knife, Evans saying as he advanced, I will kill you. Davis then commenced firing and fired five shots. About the time Davis fired his fifth shot an officer caught him."

J. H. GREGORY.

Subscribed and sworn to by J. H. Gregory before me on this the 4th day of November, A. D. 1889.

[SEAL.] M. RODERICK,
J. P. and ex Officio Notary Public, Parker County, Texas.

"EXHIBIT F." Affidavit of W. O. Gregory.

Affidavit of W. O. Gregory.

THE STATE OF TEXAS, }
County of Parker. }

Before me, the undersigned authority, this day personally appeared W. O. Gregory, who, being by me duly sworn, deposes and says that he resides in Parker county, Texas, and that he went from his home to Fort Worth, Texas, in Tarrant county, on the 6th day of July, 1889, and that late in the afternoon of that day affiant and J. H. Gregory, who was travelling with him in a wagon, camped on the road leading west from Fort Worth, in Tarrant county, between the white school-house and Fort Worth and east from said school-house; that just before dark on that evening Dunk Grant, a
78 colored man, riding on horseback and coming west from towards Fort Worth, stopped at our camp and spoke to us; that during the conversation Grant said that B. C. Evans was shot with a pistol and killed in his store, at Fort Worth, that evening by a man named Davis, one of the clerks in the store; that he, Grant, was just from Fort Worth, and that he lived in Tarrant county, one mile west from the white school-house, and that he was then on his way home; that Grant also said in the conversation that he then had a brother-in-law in jail at Fort Worth on a charge of killing another negro. Affiant further says that he afterwards went to the law office of B. G. Johnson, one of Davis' attorneys, and stated to him the matters set forth in this affidavit; that during said conversation at our camp one of us asked Grant how the killing occurred in which B. C. Evans was killed, and he said he was present at the time it occurred and saw it, and he then gave the following account of the occurrence: He said, "I stepped into the store door of B. C. Evans to buy some goods. I heard B. C. Evans give Davis the damned lie. Davis returned the damned lie. Evans jumped from his seat, saying, Davis, you can't give me the damned lie. I will kill you. At the same time Evans drew his hand from his pocket, and, from the best he could tell, had a spring knife, as Evans did not use his other hand in opening the knife, Evans also at the same time starting towards Davis. Davis then began shooting, firing five shots. About the time Davis fired the fifth shot an officer got Davis."

W. O. GREGORY.

Subscribed and sworn to by W. O. Gregory before me on this the 4th day of November, A. D. 1889.

[SEAL.] M. RODERICK,
J. P. and ex Officio Notary Public, Parker County, Texas.

EXHIBIT "H."

Affidavit of Jeff. Daggett.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, the undersigned authority, this day personally appeared Jeff. Daggett (colored), who, being by me duly sworn, deposes and says that he was on the 6th day of July, 1889, and still is confined in the county jail of Tarrant county awaiting trial on a charge of killing another man, also colored, and that affiant is a brother-in-law of Dunk Grant, a colored man who lives in Tarrant county,
79 Texas, west from Fort Worth, in the white settlement, about one mile west from the white school-house, and that affiant has no other brother-in-law living in that part of the county.

JEFF. DAGGETT.

Subscribed and sworn to before me this 7th day of Nov., 1889.

[SEAL.] JNO. P. KING,
Cl'k Co. C't, Tarrant County, Texas,
By H. A. VOLCK, *Deputy.*

EXHIBIT "I."

Affidavit of B. G. Johnson.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, the undersigned authority, this day personally appeared B. G. Johnson, who, being duly sworn, says, by way of controverting the affidavit of J. C. Young, filed in this cause by the prosecution, *says* that said J. C. Young did, in fact, on the morning of the 28th day of October, 1889, voluntarily go to affiant while he was taking breakfast at Hyde's restaurant, in the city of Fort Worth, and did then and there, without any interrogation or solicitation from affiant, impart to affiant all the information stated in the defendant's motion to postpone the hearing of the motion for new trial on file in this cause, and at the same time requested affiant not to disclose his name in connection with the information, as it would cause him to be censured and persecuted by others, but that affiant was compelled, in duty to his client, who was under sentence of death, to disclose the whole matter to the court in his motion to postpone said hearing; that at that time affiant had never heard of the existence of such a man as J. R. Walker or Dr. Damron; had never seen Doctor Gordon; was not acquainted with W. N. Mosely; had no knowledge whatever as to the place of residence of either one of said men, nor that they had heard the statements made by the juror D. F. Wilson, but that said facts were all then and there furnished affiant by said J. C. Young, who then went with affiant to

the district court room and prompted affiant as to said names and facts while affiant was preparing said motion to postpone. Affiant further says that said motion to postpone was passed upon by the court at 11 o'clock on the morning of Monday, October 28th, 1889, granting defendant's attorney until Wednesday morning following, to wit, until 9 o'clock, October 30th, to go and see said J. R. Walker,
Doctor Gordon, and Doctor Damron and W. N. Mosely in
80 order to get their affidavits as to the statements of said juror,
D. F. Wilson, and that affiant at once ordered a team to be sent to his office by half past one p. m. of the same day in order that he might go to the town of Azle, where said first three witnesses reside, the same being between 18 and 20 miles from the city of Fort Worth, in order to procure said affidavits; that in pursuance of said information so imparted by said J. C. Young affiant left Fort Worth for said town of Azle at 2 p. m. on said October 28th and arrived at Azle at 5 o'clock the same day and found on arriving there that Mr. H. M. Furman had left Fort Worth for Azle in advance of affiant, and that he was then there at Azle and had talked with Doctor Damron and Doctor Gordon regarding the information imparted by J. C. Young, and that said attorney, H. M. Furman, had already procured the affidavits of Doctor Gordon on that day before affiant arrived at Azle, in which said Gordon swears that he "had no recollection" of the statements made by the juror Wilson, and that while affiant was standing in the door of J. R. Walker's drug store, inquiring for Doctor Damron, affiant saw said attorney, Mr. H. M. Furman, coming from Doctor Damron's residence in company with Doctor Damron, and that when they got near to affiant said attorney, Mr. H. M. Furman, called to affiant and introduced him to his companion, Doctor Damron, and informed affiant that he and Doctor Damron were going across the street to take some affidavits, and that affiant could go over with them if he desired, which kind invitation the affiant accepted by going behind said parties to the office of the notary public, Mr. Snodgrass, before whom said Doctor Damron made the affidavit filed by the prosecution in this case, showing that "he does not recollect what the juror did say," and that affiant had no opportunity to consult with either of said Gordon or Damron until their said affidavits of "failure of recollection" were procured by said Furman; that on the next morning affiant went to the house of W. N. Mosely, residing near Azle, to get his affidavit, and got his affidavit on the same day by following him to Fort Worth, where he had come on business; that affiant can verify all the above matter regarding the affidavits of Doctor Gordon and Doctor Damron by said attorney, Mr. H. M. Furman, and by M. B. Johnson, who went with affiant to Azle, and by J. R. Walker, druggist at Azle, and by Notary Public Snodgrass and by Doctor Gordon and
Doctor Damron, provided they "recollect" the same; that the
81 above matters are not intended to reflect upon Mr. Furman,
because he was the attorney employed by the private prosecutors and had a right to procure affidavits in the interest of his clients, but that the facts set forth above are stated to show to the court that affiant did in fact receive said information from said J.

C. Young regarding the knowledge of Billy (W. N.) Mosely, J. R. Walker, Doctor Gordon, and Doctor Damron. Affiant further says that he has known said J. C. Young for many years, and has always known him as an honorable and worthy man, who would not swear falsely, and that affiant believes that said Young was impelled to make the affidavit of denial of having given affiant said information on account of the bitter prejudice and terrible excitement existing against the defendant in that part of the country where defendant resides, near the town of Azle. Affiant further says that he is personally acquainted with the witnesses, W. O. Gregory and J. H. Gregory and Jeff Daggett, whose affidavits are attached to the motion for new trial, and that said W. O. Gregory and J. H. Gregory are business and white men of the strictest honor and integrity, and that they reside outside of Tarrant county, where they cannot be influenced by any combination or influence or prejudice against the defendant existing in Tarrant county, and that said witness, Jeff Daggett, is an intelligent colored man, with sufficient education to read and write, and signed his own name in a legible hand to his affidavits in this case, and that said Jeff Daggett has been known in this county for a number of years as a negro of the usual character for veracity and credibility.

B. G. JOHNSON,
Attorney for Defendant.

Sworn to and subscribed before me this the 11th day of November, A. D. 1889.

L. R. TAYLOR,
District Clerk.

EXHIBIT "J."

Deputation of J. H. Maddox.

THE STATE OF TEXAS, }
County of Tarrant. }

I, J. C. Richardson, sheriff of the county of Tarrant and the State of Texas, having full confidence in J. H. Maddox, — my true and lawful deputy, in my name, place, and stead to do and perform any and all acts and things done by him pertaining to the office of said
82 sheriff of said county and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue hereof.

Witness my hand this 15th day of Nov'r, A. D. 1889.

J. C. RICHARDSON,
Sheriff of Tarrant County, Tex.

Oath of Office.

I, J. H. Maddox, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as deputy sheriff of Tarrant county, Texas, according to the best of

my skill and ability, agreeably to the Constitution and laws of the United States and of this State; and I further solemnly swear that since the adoption of the constitution of this State — have not fought a duel with deadly weapons within this State nor out of it, I being a citizen of this State, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as a second in carrying a challenge or aided or advised or assisted any person thus offending; and I further solemnly swear that I have not, directly or indirectly, paid, offered, or promised to pay, contributed nor promised to contribute, any money or valuable thing, or promised any public office or employment as a reward to secure my appointment as such deputy, so help me God.

J. H. MADDOX.

Sworn to and subscribed before me this 15th day of November, 1888.

JNO. F. SWAYNE,
[SEAL.] *Cl'k Co. C't, Tarrant County, Texas,*
By J. F. PROSSER, *Deputy.*

Filed for record 9 o'clock a. m. the 15th day of November, A. D. 1888, and duly recorded in Book 4 *and* Deputations and Official Bonds, page 6, of Tarrant county records.

Witness my hand and official seal this 17th day of November, A. D. 1888.

JNO. P. KING,
County Clerk, Tarrant County, Texas,
By A. P. COLLINS, *Deputy.*

THE STATE OF TEXAS, }
County of Tarrant. }

I, John P. King, clerk of the county court of Tarrant county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original deputation of J. H. Maddox as the same appears on file in my office, and also of record in my office in
83 the Official Bonds and Deputations Record of Tarrant County, Texas, vol. 4, on page 6.

Given under my hand and official seal this the 8th day of November, A. D. 1889.

JNO P. KING,
[SEAL.] *Clerk of the County Court, Tarrant County, Texas,*
By JAS. F. PROSSER, *Deputy.*

EXHIBIT "K."

Deputation of W. M. Rea.

THE STATE OF TEXAS, }
County of Tarrant. }

I, J. C. Richardson, sheriff of the county of Tarrant and State of Texas, having full confidence in W. M. Rea, of said county and

State, do hereby nominate and appoint him, the said W. M. Rea, my true and lawful deputy, in my name, place, and stead to do and perform any and all acts and things done by him pertaining to the office of said sheriff of said county and State, hereby ratifying and confirming any and all acts and things lawfully done in the premises by virtue hereof.

Witness my hand this 4th day of April, A. D. 1889.

J. C. RICHARDSON,
Sheriff of Tarrant County, Tex.

Oath of Office.

I, W. M. Rea, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as deputy sheriff of Tarrant county, Texas, according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State; and I do further solemnly swear that since the adoption of the constitution of this State I, being a citizen of this State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge or aided, advised, or assisted any person thus offending; and I further solemnly swear that I have not, directly nor indirectly, paid, offered, or promised to pay, contributed nor promised to contribute, any money or valuable thing or promised any public office or employment as a reward to secure my appointment as such deputy, so help me God.

W. M. REA.

Sworn to and subscribed before me this 4th day of April, 1889.

[SEAL.] L. R. TAYLOR,
District Clerk, Tarrant County, Texas.

Filed for record 3.25 o'clock p. m. the 10th day of October,
84 A. D. 1889, and duly recorded in Book 4 of Deputations, page 19, of Tarrant county records.

Witness my hand and official seal this the 10th day of October, A. D. 1889.

JNO. P. KING,
County Clerk, Tarrant County, Texas.

THE STATE OF TEXAS, }
County of Tarrant. }

I, John P. King, clerk of the county court in and for Tarrant county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original deputation of W. M. Rea as the same appears on file in my office and also of record in my office in the Official Bonds and Deputations Record of Tarrant County, Texas, in volume 4, on page 19.

Given under my hand and official seal this the 8th day of November, A. D. 1889.

JNO. P. KING,
[SEAL.] *Clerk of the County Court of Tarrant County, Texas,*
By JAS. F. PROSSER, *Deputy.*

EXHIBIT "L."

Deputation of W. T. Steele.

THE STATE OF TEXAS, }
County of Tarrant. }

I, J. C. Richardson, sheriff of Tarrant county and the State of Texas, having full confidence in W. T. Steele, of said county and State, do hereby nominate and appoint him, the said W. T. Steele, my true and lawful deputy, in my name, place, and stead to do and perform any and all acts and things by him pertaining to the office of said deputy sheriff of said county and State, hereby ratifying and confirming any and all acts and things lawfully done in the premises by virtue hereof.

J. C. RICHARDSON,
Sheriff, Tarrant County, Texas.

Oath of Office.

I, W. T. Steele, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as deputy sheriff of Tarrant county, Texas, according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State; and I do further solemnly swear that since the adoption of the constitution of this State I, being a citizen of this State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons or aided or advised or assisted any person thus offending; and I further solemnly swear that I have not, directly nor indirectly, paid, offered, or promised to pay, contributed nor promised to contribute, any money or valuable thing or promised any public office or employment as a reward to secure my appointment as such deputy, so help me God.

W. T. STEELE.

Sworn to and subscribed before me this 19th day of December, 1888.

[SEAL.] L. R. TAYLOR,
District Clerk.

Filed for record 2 o'clock p. m. the 19th day of December, A. D. 1888, and duly recorded in Book 4 of Deputations, page 12, of Tarrant county records.

Witness my hand and official seal this the 14th day of March, A. D. 1889.

JNO. P. KING,
County Clerk, Tarrant County, Tex.,
By JAS. F. PROSSER, *Deputy.*

THE STATE OF TEXAS, }
County of Tarrant. }

I, John P. King, clerk of the county court of Tarrant county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original deputation of W. T. Steele as the same appears on file in my office and also of record in my office in the Official Bonds and Deputations Record of Tarrant County, Texas, in vol. 4, on page 12.

Given under my hand and seal of office this 8th day of November, A. D. 1889.

JNO. P. KING,
[SEAL.] *Clerk of the County Court of Tarrant County, Texas,*
By JAS. F. PROSSER, *Deputy.*

EXHIBIT "M."

Deputation of B. R. Elliott.

THE STATE OF TEXAS, }
County of Tarrant. }

I, J. C. Richardson, sheriff of the county of Tarrant and the State of Texas, having full confidence in B. R. Elliott, of said county and State, do hereby nominate and appoint him, the said B. R. Elliott, my true and lawful deputy, in my name, place, and stead to do and perform all acts and things done by him pertaining to the office of said deputy sheriff of said county and State, hereby ratifying and confirming any and all acts and things lawfully done in the premises by virtue hereof.

Witness my hand this the 15th day of November, A. D. 1888.

J. C. RICHARDSON,
Sheriff, Tarrant County, Texas.

86 *Oath of Office.*

I, B. R. Elliott, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as deputy sheriff of Tarrant county, Texas, according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State; and I do further solemnly swear that since the adoption of the constitution of this State I, being a citizen of this State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge or aided, advised, or assisted any person thus offending; and I furthermore solemnly swear that I have not, directly nor indirectly, offered or promised to pay, contributed nor promised to con-

tribute, any money, or valuable thing or promised any public office or employment as a reward to secure my appointment as such deputy, so help me God.

B. R. ELLIOTT.

Sworn to and subscribed before me this 15th day of November, 1888.

JNO. P. KING,
Cl'k Co. Ct, Tarrant County, Texas,
By J. F. PROSSER, *Deputy.*

[SEAL.]

Filed for record 9 o'clock a. m. the 15th day of November, A. D. 188–, and duly recorded in Book — of Deputations and Official Bonds, page 6, of Tarrant county records.

Witness my hand and official seal this the 17th day of November, A. D. 1888.

JNO. P. KING,
Clerk County Court, Tarrant Co., Tex.,
By A. P. COLLINS, *Deputy.*

THE STATE OF TEXAS, }
County of Tarrant. }

I, Jno. P. King, clerk of the county court of Tarrant county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original deputation of B. R. Elliott as the same appears on file in my office and also of record in my office in the Official Bonds and Deputations Record of Tarrant County, Texas, in vol. 4, on page 6.

Given under my hand and official seal this the 8th day of November, A. D. 1889.

JNO. P. KING,
Clerk of the County Court of Tarrant County, Texas,
By JAS. F. PROSSER, *Deputy.*

[SEAL.]

87 EXHIBIT "N."

Deputation of Joseph P. Witcher.

THE STATE OF TEXAS, }
County of Tarrant. }

I, J. C. Richardson, sheriff of the county of Tarrant and the State of Texas, having full confidence in Joseph P. Witcher, of said county and State, do hereby nominate and appoint him, the said Joseph P. Witcher, of said county and State, my true and lawful deputy, in my name, place, and stead to do and perform any and all acts and things done by him pertaining to the office of said sheriff of said county and State, hereby ratifying and confirming any and all acts and things lawfully done in the premises by virtue hereof.

Witness my hand this 27th day of December, A. D. 1888.

J. C. RICHARDSON,
Sheriff, Tarrant County, Texas.

Oath of Office.

I, Joseph P. Witcher, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as deputy sheriff according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State; and I do furthermore solemnly swear that since the adoption of the constitution of this State I, being a citizen of State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge or aided, advised, or assisted any person thus offending; and I further solemnly swear that I have not, directly nor indirectly, paid, offerred, or promised to pay, contributed nor promised to contribute, any money or valuable thing or promised any public office or employment as a reward to secure my appointment as such deputy, so help me God.

J. P. WITCHER.

Sworn to and subscribed before me this 27th day of December, 1888.

JOHN P. KING,
[SEAL.] *County Clerk, Tarrant County, Texas.*

Filed for record 10.30 o'clock a. m. the 27th day of Dec., A. D. 1888, and duly recorded in Book 4 of Deputations and Bonds, page 11, of Tarrant county records.

Witness my hand and official seal this the 27th day of December, A. D. 1888.

JNO. P. KING,
County Clerk, Tarrant County, Texas.

88 THE STATE OF TEXAS, }
County of Tarrant. }

I, John P. King, clerk of the county court of Tarrant county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original deputation of Jos. P. Witcher as the same appears of record in my office, also on file, of record in the Official Bonds and Deputations Record of Tarrant County, Texas, in vol. 4, page 11.

Given under my hand and official seal this the 8th day of November, A. D. 1889.

JNO. P. KING,
[SEAL.] *Clerk of the County Court of Tarrant County, Texas,*
By JAS. F. PROSSER, *Deputy.*

EXHIBIT "O."

Deputation of W. L. Rushing.

THE STATE OF TEXAS, }
County of Tarrant. }

I, J. C. Richardson, sheriff of the county of Tarrant and State of Texas, having full confidence in W. L. Rushing, of said county and State, do hereby nominate and appoint said W. L. Rushing my true and lawful deputy, in my name, place, and stead to do and perform any and all acts and things done by him pertaining to the office of said sheriff of said county and State are hereby ratified and confirmed and all such acts and things lawfully done in the premises by virtue hereof.

J. C. RICHARDSON,
Sheriff, Tarrant County, Texas.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, L. R. Taylor, district clerk Tarrant county, on this day personally appeared J. C. Richardson, sheriff of Tarrant county, Texas, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 3rd day of July, A. D. 1889.

L. R. TAYLOR,
[SEAL.] *District Clerk, Tarrant Co., Tex.*

Oath of Office.

I, W. L. Rushing, do solemnly swear that I will faithfully and impartially discharge and perform all the duties incumbent upon me as deputy sheriff of Tarrant county, Texas, according to the best of my skill and ability, agreeably to the Constitution and laws of the United States and of this State; and I do further solemnly swear that since the adoption of the constitution of this State I,
89 being a citizen of this State, have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge or aided or advised or assisted any person thus offending; and I furthermore solemnly swear that I have not, directly nor indirectly, paid, offerred, or promised to pay, contributed nor promised to contribute, any money or valuable thing or promised any public office or employment as a reward to secure my appointment as such deputy, so help me God.

W. L. RUSHING.

Sworn to and subscribed before me on this 3rd day of July, A. D. 1889.

L. R. TAYLOR,
District Clerk, Tarrant Co., Tex.

Filed for record 12 o'clock m. the 4th day of July, A. D. 1889, and duly recorded in Book 4 of Deputations, page 18, of Tarrant county records.

Witness my hand and official seal this the 13th day of July, A. D. 1889.

[SEAL.] JNO. P. KING,
County Clerk, Tarrant Co., Tex.,
By JAS. F. PROSSER, *Deputy.*

THE STATE OF TEXAS, }
County of Tarrant. }

I, John P. King, county clerk of Tarrant county, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original deputation of W. L. Rushing as the same appears on file in my office and also of record in my office in the Official Bonds and Deputations Record of Tarrant County, Texas, in volume 4, on page 18.

Given under my hand and official seal this the 8th day of November, A. D. 1889.

[SEAL.] JNO. P. KING,
Clerk of the County Court of Tarrant County, Texas,
By JAS. F. PROSSER, *Deputy.*

List of Jury Chosen.

J. H. Orr.	Thomas Metcalf.	C. M. Clingman.
Robert Thomas.	I. A. Bishop.	J. M. Beal.
T. E. Davidson.	W. M. Eagle.	E. J. Clark.
D. F. Wilson.	John Autrey.	W. B. Freeman.

Filed November 11th, 1889.

L. R. TAYLOR,
District Clerk.

90 *Order Overruling Defendant's 2nd Amended Motion for New Trial, Nov.* 18, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. November 18th, 1889.

And now comes B. P. Ayers, county attorney, representing the pleas of the State; also came the defendant in his own proper person and by attorney, B. G. Johnson, and then came on to be heard the defendant's second amended motion for new trial herein; and the court having heard said motion and argument thereon and being fully advised in the premises, it is the opinion of the court that the

law is against the defendant, and defendant's said second amended motion for new trial is therefore overruled; to which said ruling of the court the defendant excepts.

Order for Special Venire of 100, *Sept.* 16, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. September 16th, 1889.

On application of the county attorney, prosecuting the pleas of the State, this cause is set for trial on the 8th day of October, 1889, and a special venire of 100 men is hereby ordered to be drawn and issued herein for that date, and that said writ be made returnable on the 5th day of October, 1889.

Motion to Quash Special Venire. Filed Oct. 8, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } Defendant's Motion to Quash Special Venire.

Comes now the defendant in the above-entitled cause and moves the court to quash the venire in this case on the following grounds:

1. Because he says that the order of the court for the special venire ordered the drawing of 100 men as a special venire in this case, while in truth and in fact the clerk only drew 99 men on said venire, having drawn the name of W. H. Percy twice.

2. Because there is no good reason shown in the officer's
91 return for a failure to serve the 33 jurors who are shown by the special venire in this case not to have been served; reference made to Exhibit A.

3. Because the officer's return does not state the diligence used to find and serve the jurors that were not served.

4. Because the venire in this case were not drawn out of a box, as required by law.

E. G. JOHNSON.
S. C. UPSHAW.

Filed October 8th, 1889.

L. R. TAYLOR,
District Clerk.

Leave for Sheriff to Amend Return on Special Venire, Oct. 8, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. October 8th, 1889.

On application of the county attorney prosecuting the pleas of the State therefor it is ordered by the court that the sheriff of Tarrant county be, and he is hereby, granted leave of the court to amend his return on the writ of special venire heretofore issued in this cause.

Special Venire. Issued Sept. 17, 1889.

The State of Texas to the sheriff or any constable of Tarrant county, Greeting:

Whereas in a certain case pending in the district court of Tarrant county, Texas, No. 5563, wherein The State of Texas is plaintiff and J. W. Davis is defendant, on a charge of the crime of murder, the following-named sixty persons have been selected in the manner provided by law to serve as special jurors, to wit:

1. W. G. Nichols.
2. W. H. Percy.
3. J. K. Turner.
4. Harry Strohl.
92 5. W. F. Lake.
6. J. V. Bloxom.
7. C. B. Teague.
8. T. A. Tidball.
9. Rich. Sullivan.
10. S. D. Lassiter.
11. J. W. Walker.
12. L. W. Stallings.
13. Wm. Tannehill.
14. B. H. Myers.
15. J. E. Vickery.
16. Jas. Harrison.
17. J. K. P. Hammond.
18. B. F. Jones.
19. Mitch. Plummer.
20. S. P. Tucker.
21. A. Bratton.
22. R. O. Newsom.
23. J. T. Yancey.
24. J. F. M. Stanfield.
25. Joe Tolliver.
26. W. R. Joyce.
27. W. A. Sanderson.
28. W. E. Woods.
29. Mell Holt.
30. J. M. Massie.
31. E. H. Ramsey.
32. N. C. Pyles.
33. L. A. Trimble.
34. J. M. Williams.
35. M. R. McGill.
36. W. R. Ferrill.
37. Eugene Roche.
38. P. C. Wellborn.
39. W. C. Henderson.
40. J. H. Ragland.
51. A. G. Walker.
52. J. W. Tewmey.
53. J. R. Rowland.
54. G. B. Maddox.
55. T. P. Goodfellow.
56. O. B. Mahan.
57. Ed. Hovenkamp.
58. Bob Erwin.
59. C. H. Higbee.
60. B. H. Starr.
61. Porter King.
62. H. C. Mosely.
63. M. Putnam.
64. J. W. Squires.
65. C. C. Willis.
66. S. C. Millard.
67. R. W. Hitch.
68. E. E. Fosdick.
69. G. W. Wilkes.
70. P. H. Ford.
71. J. N. Rice.
72. J. H. Hazzard.
73. Rube Hedges.
74. J. C. Roy.
75. C. B. Gentry.
76. J. L. Stephenson.
77. C. C. Estelle.
78. C. R. Scott.
79. Wm. Trigg.
80. C. B. Lashley.
81. Jas. Bradford.
82. T. E. McMurray.
83. J. S. Runion.
84. J. G. Rogers.
85. W. H. Percy.
86. H. C. Jewell.
87. J. H. Watson.
88. R. N. Hanger.
89. T. R. Sanders.
90. T. H. Watson.

41. A. Ochander.
42. J. A. Hovenkamp.
93 43. W. A. Robinson.
44. T. R. Sandidge.
45. J. J. West, Jr.
46. H. Poe.
47. J. W. Thomas.
48. John A. Bergin.
49. Jno. F. Zinn.
50. J. N. Haley.
91. A. McVean.
92. Harrison Weaver.
93. Thomas Fitch.
94. J. N. Manuel.
95. J. G. Human.
96. H. C. Johnson.
97. S. H. Patterson.
98. Calvin Speer.
99. F. V. Terry.
100. J. P. Phillips.

Therefore you are hereby commanded to summon each of the foregoing named sixty persons to be and appear before the honorable district court of Tarrant county, Texas, at the court-house thereof, in the city of Fort Worth, on the 8th day of October, A. D. 1889, at 9 o'clock a. m., then and there to serve as special jurors as aforesaid in the above-stated cause.

Herein fail not, but of this writ make due return as the law directs.

Witness L. R. Taylor, clerk of the district court of Tarrant county.

Given under my hand and seal of said court, at office, in the city of Fort Worth, this the 17th day of September, A. D. 1889.

L. R. TAYLOR,

[SEAL.] *Clerk District Court Tarrant Co.*

Sheriff's Return.

Came to hand on the 18th day of September, A. D. 1889, and executed by summoning the following-named persons in person and by written summons, to wit:

1.
2. W. H. Percy.
3. J. K. Turner.
4.
5. W. H. Lake.
6.
7. C. B. Teague.
8. T. A. Tidball.
9. Richard Sullivan.
10. S. D. Lassiter.
11.
12. L. H. Stallions.
13.
94 14.
15.
16. James Harrison.
17.
18. B. F. Jones.
19. Mitch. Plummer.
20. S. P. Tucker.
21. A. Bratton.
22. R. O. Newsoms.
23. J. T. Yancey.
24.
25. Joe Tolliver.
26. W. R. Joyce.
27.
28. W. E. Woods.
29.
30. J. M. Massie.
31. E. H. Ramsey.
32. N. C. Pyles.
33. L. A. Trimble.
34. J. M. Williams.
35.
36.
37. Eugene Roche.
38. P. C. Wellborn.
39. W. C. Henderson.
40. J. H. Rowland.
41. A. Okander.
42.
43. W. A. Robinson.
44. T. R. Sandidge.
45. J. J. West, Jr.
46. H. Poe.
47. J. W. Thomas.
48. John A. Bergin.
49. Jno. F. Zinn.
50.
51. A. G. Walker.
52.
53.
54. G. B. Maddox.
55. T. P. Goodfellow.
56. O. B. Mahan.
57. Ed. Hovenkamp.
58. Bob Erwin.
59. C. H. Higbee.
60. B. H. Starr.

And the following-named persons not found in —— county after diligent search, to wit:

61. Porter King.	81. Jas. Bradford.	93. Thos. Fitch.
62. H. C. Mosely.	82. T. E. McMurray.	94. J. N. Manual.
63. M. Putnam.	83. W. H. Percy.	95. J. G. Human.
64.	84.	96. H. C. Johnson.
65.	85.	97.
66.		98. Calvin Spear.

—— ——,
Sheriff —— *County, Texas,*
By —— ——, *Deputy.*

67.		
68. E. E. Fosdick.		
69. G. W. Wilkes.		
70. P. H. Ford.		
71.		
72. J. H. Hazzard.		
73. Rube Hedges.		
74. J. C. Roy.	86. H. C. Jewell.	99. F. V. Terry.
75. C. B. Gentry.	87. J. H. Watson.	100. J. P. Phillips.
76. J. L. Stephenson.	88. R. N. Hanger.	56.
77. C. C. Estelle.	89.	57.
78. C. R. Scott.	90.	58.
79. Wm. Trigg.	91. A. McVean.	59.
80. C. B. Lashley.	92.	60.

And the following-named persons not found in Tarrant county after diligent search at the homes of said parties and all over the county, to wit: W. G. Nichols, Harry Strohl, J. V. Bloxom, J. W. Walker, Wm. Tannehill, B. H. Myers, J. E. Vickery, J. K. P. Hammond, J. W. Squires, C. C. Willis, S. C. Millard, R. W. Hatch, J. N. Rice, J. F. M. Stanfield, W. A. Sanderson, Mell Holt, M. R. MaGill, W. R. Ferrill, J. S. Runion, J. C. Rogers, T. R. Sanders, T. H. Watson, Harrison Weaver, S. H. Patterson, J. A. Hovenkamp, J. M.
95 Haley, J. M. Tewmey, and J. R. Rowland.

J. C. RICHARDSON,
Sheriff, Tarrant County, Texas,
By W. M. REA, *Deputy.*

Issued on the 17th day of Sep., 1889.

L. R. TAYLOR,
District Clerk.

Returnable on the 5th day of October, 1889.

L. R. TAYLOR,
District Clerk.

Filed October 5th, 1889.

L. R. TAYLOR,
District Clerk.

Order Overruling Motion to Quash Special Venire, Oct. 8, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. October 8th, 1889.

This day this cause was called, and the State appeared by her county attorney and the defendant appearing in person, his counsel also being present, and then came on to be heard the defendant's motion to quash the venire heretofore drawn and issued in this cause, and, the same having been heard by the court, it is considered, ordered, and adjudged by the court that the said motion be, and the same is, in all things overruled; to which ruling of the court the defendant excepts.

Motion to Change Venue. Filed Oct. 8, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } Defendant's Motion to Change Venue.

Comes now the defendant in the above cause and presents to the court that defendant is a poor man, without money or property; that he has no family except his aged mother, and that at the time of the death of B. C. Evans, who is charged in this case to have been killed by defendant, defendant was supporting himself and his mother by working as a hired clerk in the dry-goods store
96 owned and operated by the B. C. Evans Company, a corporation located in the city of Fort Worth; that at the time of the death of said B. C. Evans said Evans was a large stockholder in and president of the said B. C. Evans Company, a corporation having many officers, stockholders, and employés of great wealth and influence residing in Tarrant county, and was also a large stockholder in and president of the Martin Brown Company, a corporation, dealing in wholesale dry goods and notions, located in said county, and having a large number of officers, stockholders, and employés residing in said city and county of great wealth and influence; that B. C. Evans, at the time of his death, was also a stockholder in and a member of the board of directors of the Farmers' and Mechanics' National Bank of Fort Worth, Texas, a banking corporation located in Tarrant county, Texas, and having many officers, stockholders, and persons of wealth and influence residing in said city and county; that prior to his death the said B. C. Evans was also president of one of the companies of the Fort Worth fire department, having many influential members residing in Tarrant county, and that said fire company, immediately after the death of said Evans, called a special meeting and attended the funeral of said Evans in a body; that at the time of his death said Evans was also an honorary member of a State militia company located in Tarrant county, organized and equipped under the laws of the State, and that the officers and militiamen of said military company also held a special

meeting and attended said funeral in a body; that prior to his death said B. C. Evans was also a stockholder in and vice-president of the Rosedale Street Railway Company, a corporation located in Tarrant county and having many officers, stockholders, and employés of wealth and influence residing in Tarrant county and the city of Fort Worth; that owing to the fact that said Evans was president of the said Martin Brown Company, a corporation handling wholesale dry goods and notions, and president of the B. C. Evans Co., a corporation selling wholesale and retail lots of dry goods, boots and shoes, &c., nearly all the retail dry-goods merchants in the city of Fort Worth and in all the towns and villages in Tarrant county were friends and customers of said B. C. Evans, giving to said Evans a large acquaintance and influence, not only in the city of Fort Worth, but throughout the entire county of Tarrant; that defendant had no connection with any of said houses, companies, or corporations in any manner except as a clerk in
97 said dry-goods house, and was on that account comparatively obscure and unknown in said county; that immediately after the death of said Evans meetings were called and held by the stockholders and members of several of said corporations and companies, at which many wealthy and influential citizens of Tarrant county attended, at which meetings resolutions regarding the death of said Evans were written and passed and published in the newspapers throughout the city and county of Tarrant; that after the death of said B. C. Evans forty-three employés of said corporation, the B. C. Evans Co., met and passed resolutions regarding the death of said Evans, reducing said resolutions to writing, each one of said forty-three employés signing his full name to said resolutions, which resolutions and names thereto signed were published by the daily newspapers throughout Tarrant county; that all of said published resolutions eulogized and extolled B. C. Evans, but contained no word of sentiment favorable to the defendant, defendant being then confined in jail and not represented in any of said meetings or resolutions; that immediately after the killing of said Evans several public indignation meetings were held in Tarrant county in answer to calls for the same published in the daily newspapers for the purpose of giving expression of the public indignation at the killing of said Evans, and that said indignation meetings were attended and presided over by some of the most influential citizens of the city and county, who made public speeches condemning the killing of B. C. Evans as a murder; that one of the said indignation meetings was held in the district court room of the county court-house, where this case is now pending, at which meeting the following language was used in a public speech there delivered by a citizen of Tarrant county, to wit: "If it had been the custom to deal with such cases promptly, and had the slayer (meaning defendant) known that in a week from the time he slew Mr. Evans justice would be meted out to him, the killing would not have occurred;" which speech was greeted with a storm of applause by the greater number of influential citizens present; that said speech and the proceedings of said indignation meetings were published in the daily papers of

Fort Worth and Tarrant county; that immediately after the death of said Evans the daily newspapers in Fort Worth and Tarrant county on several days published lengthy and sensational articles purporting to give the facts concerning the killing of B. C. Evans by the defendant, J. W. Davis, all of which publications were favorable to B. C. Evans and the State's theory of this case and unfavorable to the defendant and the theory of the defense in this case; that, owing to the above-stated facts, great excitement and public indignation followed the killing of B. C. Evans, and many people then in the city talked openly upon the street of forming a mob to lynch said defendant, Davis, without allowing him the privilege of a trial by a court and jury, and that, on account of all of said matters, great excitement and prejudice has ever since existed and do now exist throughout Tarrant county against the defendant, J. W. Davis; that the sons of two of the jurors who were drawn to try this case signed the set of resolutions published by the forty-three employés of the B. C. Evans Company, hereinbefore stated; that one-fourth of the jurors drawn on the special venire to try this case reside in the city of Fort Worth, where all of said meetings and publications occurred and where the highest of said excitement and prejudice exists, and only 93 days have elapsed since the killing of B. C. Evans. Wherefore defendant comes and says:

98

1. That there exists in Tarrant county so great a prejudice against the defendant, J. W. Davis, that he cannot obtain a fair and impartial trial in this case in Tarrant county.

2. That there is a dangerous combination against him in Tarrant county, instigated by influential persons, by reason of which he cannot expect a fair trial in said county.

Wherefore defendant moves the court to change the venue of this cause and to remove the same for trial to the county having the county-seat nearest to that of Tarrant county, as provided by law, in order that the defendant may have a fair and impartial trial in this cause.

BYRON G. JOHNSON.
S. C. UPSHAW.
W. M. PERRILL.
J. W. DAVIS.

Affidavit of Davis, Caple, Speer, and Martin.

THE STATE OF TEXAS, }
County of Tarrant. }

Before me, the undersigned authority, this day personally appeared J. W. Davis, the defendant, and Calvin Speer, P. C. Caples, and P. Martin, who, being duly sworn, depose and say that they each reside in Tarrant county, Texas, and are well acquainted with the public sentiment regarding the killing of B. C. Evans by the defendant, J. W. Davis, and that the facts stated in the foregoing motion for change of venue in said cause of The

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State of Texas *vs.* J. W. Davis are true, to the best of their knowledge and belief.

J. W. DAVIS.
P. C. CAPLE.
CALVIN SPEER.
P. MARTIN.

Subscribed and sworn to before me by J. W. Davis this 8th day of October, 1889.

L. R. TAYLOR,
District Clerk.

Sworn to and subscribed before me by P. C. Caple, Calvin Speer, and P. Martin on this the 8th day of October, 1889.

L. R. TAYLOR,
District Clerk,
By J. M. COLLIER, *Deputy.*

Filed October 8th, 1889.

L. R. TAYLOR,
District Clerk.

Affidavit Controverting Motion to Change Venue. Filed Oct. 8, 1889.

In District Court, Tarrant County.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Now come the undersigned parties, each and all of whom reside in Tarrant county, Texas, and, being duly sworn, on oath say that they have read the application for a change of venue filed in this case by the defendant, and that P. C. Caple, Calvin Speer, and P. Martin, the parties who have joined with defendant in swearing to the facts stated in said motion, do not possess the means of knowledge to enable them to testify to the facts therein stated, and that said parties do not know the sentiment of the people of Tarrant county as to the matters stated in said application, and affiants expressly deny that there exists in Tarrant county so great a prejudice against the defendant, J. W. Davis, that he cannot expect a fair and impartial trial in this case in Tarrant county; and they
100 also expressly deny that there is a dangerous combination against said defendant, J. W. Davis, in Tarrant county, instigated by influential persons, by reason of which this defendant cannot expect and obtain a fair and impartial trial in Tarrant county. Affiants further show that Tarrant county is a large and populous county, containing over seven thousand voters, all of whom are qualified jurors, the majority of whom do not reside in the city of Fort Worth, and that there is no reason why the defendant cannot obtain a perfectly fair and impartial trial in Tarrant county, and that, as a matter of fact, but very little, if any, personal prejudice

exists in Tarrant county against defendant, and that there is no combination here against him of any character whatever of which affiants have ever heard.

H. C. JOHNSON.
L. L. JOPLING.
L. W. STALLONS.
B. A. MATHERS.
B. H. SHIPP.
E. P. LINGENFELTER.
J. P. NICKS.
R. H. TUCKER.
W. P. THOMAS.

Before me, L. R. Taylor, district clerk, Tarrant county, Texas, on this day personally appeared H. C. Johnson, L. L. Jopling, L. W. Stallons, B. A. Mathers, B. H. Shipp, E. P. Lingenfelter, J. P. Nicks, R. H. Tucker, and W. P. Thomas, each and all of whom are known to me to be credible citizens of Tarrant county, Texas, who, being duly sworn, say that the facts stated in the foregoing affidavit are, within their knowledge, true.

Witness my hand and seal of office this the 8th day of October, 1889.

[SEAL.]

L. R. TAYLOR,
District Clerk, Tarrant County.

Filed October 8th, 1889.

L. R. TAYLOR,
District Clerk.

Defendant's Exceptions to State's Counter-Affidavit. Filed Oct. 8, 1889.

THE STATE OF TEXAS *vs.* J. W. DAVIS. } Defendant's Exceptions to State's Counter-Affidavit to Motion to Change Venue.

Comes now the defendant in the above cause and excepts to the State's counter-affidavits to motion for change of venue in this case on the following grounds:

1. Because said counter-affidavit does not attack the char-
101 acter of the compurgators to defendant's motion to change venue for truthfulness or intelligence.

2. Because said counter-affidavit does not attack nor controvert the means of knowledge of said compurgators of the defendant.

3. Because, therefore, no issue is formed upon the defendant's motion for change of venue.

BYRON JOHNSON,
S. C. UPSHAW,
W. M. PERRELL,
Attorneys for Defendant.

Filed October 8th, 1889.

L. R. TAYLOR,
District Clerk.

Order Overruling Exceptions to Counter-Affidavit, Oct. 8, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. October 8th, 1889.

This day this cause was called, and the State appeared by her county attorney and the defendant appeared in person, his counsel also being present, and then came on to be heard the defendant's exceptions to the sufficiency of counter-affidavits on application for change of venue, and, the same having been heard by the court, it is considered, ordered, and adjudged by the court that the said exceptions be, and the same are, in all things, overruled; to which ruling of the court the defendant excepts.

Order Overruling Motion to Change Venue, Oct. 8, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. October 8th, 1889.

This day came on to be heard the application of the defendant, filed herein, asking for a change of venue, the defendant being present in person, and, the same and the evidence and argument of counsel thereon having been heard by the court, it is considered, ordered,
and adjudged by the court that the said application be, and
102 the same is, refused; to which ruling of the court the defendant excepts.

Defendant's Application for Continuance. Filed Oct. 8, 1889.

In the District Court of Tarrant County, Texas.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Comes now the defendant in the above cause and upon oath says that he cannot safely go to trial at the present term of this court for want of the testimony of J. E. Soloman and Dunk Grant, who reside in Tarrant county, Texas, and whose testimony is material and competent for the defendant in this case; that both of said witnesses reside in Tarrant county, Texas, and that they are now absent from this court without the consent or procurement of the defendant, and that this application is not made for delay, but that justice may be done, and that this is defendant's 1st application for continuance, and that defendant has a reasonable expectation of procuring the testimony of said witnesses at the next term of this court; that defendant expects to prove by said witnesses that they were both present at the time and place that B. C. Evans was killed by defendant in this case, and that both of said witnesses saw what was done

by defendant and said Evans at that time, and that said witnesses then and there also heard a part of what was said by said Evans immediately before the shooting occurred and at that time, and that defendant expects to prove by both of said witnesses that when they first saw said Evans and defendant that time that said Evans was sitting in a chair near a desk in the front of the carpet department of the store of B. C. Evans Co. in Fort Worth, Texas, fronting on Main street, and that defendant and B. C. Evans were talking together, and that B. C. Evans was talking in an angry manner to said Davis; that Davis, the defendant, said to said B. C. Evans, Mr. Evans, if you make that accusation you are a liar; upon which said B. C. Evans sprang up out of his chair and made one or two steps toward defendant, and at the same time threw his right hand down and behind him on his right side in a threatening manner, said in a quick and angry manner to defendant, You are a God damned liar, as if to draw a pistol out of his lower pocket, and that the defendant then and there, while the said Evans was in the position, immediately shot and killed the deceased, B. C.
103 Evans, and that said defendant, Davis, had made no effort at that time to draw any weapon or in any manner to assault, strike, or injure said Evans until after said Evans had acted and spoken towards him as above set forth; that defendant expects to prove the same facts by both of said witnesses, and that said facts so expected to be proven as aforesaid are true; that defendant has used due diligence to procure the attendance of said witnesses at the present term of this court, for that heretofore, on the 23rd day of September, 1889, defendant caused to be issued by the clerk of the district court of Tarrant county a subpœna for each one of said witnesses, returnable on this day, October 8th, 1889, which subpœna was, on said 23rd day of September, 1889, placed in the hands of C. L. Smith, deputy sheriff of Tarrant county, for execution; that said subpœna was not returned until the 8th day of October, 1889, when this case was called for trial, and that as to said witnesses said subpœna bears the following official return by the officer, to wit:

"Came to hand on the 23rd day of September, 1889, and following witnesses, after diligent search, not found in Tarrant county, to wit: J. E. Soloman and Dunk Grant (col.). (Signed) J. C. Richardson, sheriff Tarrant Co., Texas, by J. P. Witcher, deputy."

Which said subpœna and the official return thereon is hereto attached as part of this application; that, as this case is now called for trial, the defendant further says that he has no reasonable expectation of procuring the attendance or securing the testimony of said absent witnesses, or either of them, at the present term of this court.

J. W. DAVIS.

Sworn to and subscribed before me by J. W. Davis on this the 8th day of October, 1889.

L. R. TAYLOR,
District Clerk.

Subpœna Attached to Application for Continuance.

The State of Texas to the sheriff or any constable of Tarrant county, Greeting:

You are hereby commanded to summon G. L. Harris, Henry Finch, Frank E. McKnight, Dr. E. J. Beall, Mrs. E. A. Davis, Dr. W. A. Adams, Dr. J. R. McKnight, J. E. Soloman, R. C. Woodall, Dunk Grant (col.), to be and appear before the district court to be holden within and for the county of Tarrant, at the court-
104 house thereof, in the city of Fort Worth, on the 8th day of October, A. D. 1889, then and there to testify in behalf of the defendant in a certain suit now pending in our said court, wherein The State of Texas is plaintiff and J. W. Davis is defendant, and that they continue in attendance from day to day and from term to term until discharged by the court.

Herein fail not, but have you then and there before said court this writ with your return thereon showing how you have executed the same.

Witness L. R. Taylor, clerk of the district court of Tarrant county.

Given under my hand, at office, in the city of Fort Worth, this 23rd day of September, A. D. 1889.

L. R. TAYLOR,
Clerk District Court, Tarrant County, Tex.,
By J. M. COLLIER, *Deputy.*

Sheriff's Return.

Came to hand on the 23rd day of September, 1889, and executed on the 17th day of October, 1889, by reading the within subpœna to and in the hearing of the witnesses, viz: G. L. Harris, Henry Finch, Frank E. McKnight, Dr. W. A. Adams, Dr. J. N. McKnight, Dr. E. J. Beall, Mrs. E. A. Davis, R. E. Woodall; and the following witness-, after diligent search, not found in Tarrant county, to wit: J. E. Soloman, Dunk Grant, col.

Fees, $4.20.

J. C. RICHARDSON,
Sheriff Tarrant County, Texas,
By J. P. WITCHER, *Deputy.*

Subpœna issued on the 23rd day of September, 1889.

L. R. TAYLOR,
District Clerk.

Filed October 8th, 1889.

L. R. TAYLOR,
District Clerk.

Order Overruling Application for Continuance, Oct. 8, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. October 8th, 1889.

This day this cause being called for trial, the State appeared by her county attorney, and the defendant in his own proper person and by attorney and thereupon the defendant made an ap-
105 plication for a continuance of this cause; which application having been heard and considered by the court, the same is refused, and thereupon the trial of said cause was proceeded with; to which ruling of the court the defendant excepts.

Motion to Postpone Hearing of Motion for New Trial. Filed Oct. 28, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } Defendant's Application for Postponement of Hearing of Motion for New Trial.

Comes now the defendant in the above cause and says that he is not ready to have his application for new trial passed upon on this day for the following reasons:

1. Because he has on this day discovered, by credible information, that a few days prior to the trial of this case that one D. F. Wilson, who was one of the jurors who tried this cause, stated to and in the hearing of one James Walker and Doctor Damron, who reside at Azle, in Tarrant county, and to Billy Mosely, who resides in Tarrant county—all of whom reside about 20 miles from Fort Worth—that the defendant, J. W. Davis, was guilty of a bloody murder in killing of B. C. Evans, the deceased, and that the defendant, J. W. Davis, ought to be hanged for said murder, and that James Young, a credible citizen of Tarrant county, on this morning informed defendant's counsel of said fact and of the further fact that said parties named will make affidavits of said fact if called upon to do so, which fact defendant believes to be true, and that if the hearing of this motion is postponed until next Monday, the next call of the motion docket, defendant will procure said affidavits and make them a part of this application for new trial in this case, said matter being material in the determination of said application; that the fact that the said James Walker, Dr. Damron, and Billy Mosely would make said affidavits to said facts was not known to defendant nor his counsel until this day, although they have used due diligence to discover all matter material to said motion for new trial. Defendant further says that on Friday, the 25th day of this month, on account of inability of defendant's attorney, S. C. Upshaw, to participate in the preparation and argument of said motion for new trial at this time, one of defendant's attor-
106 neys, B. G. Johnson, went to the county attorney's office to make an agreement for said motion to be passed until next

Monday, and learned from the assistant county attorney, G. W. Finger, that the county attorney was out of the city, but that upon asking said assistant county attorney to make said agreement said assistant county attorney went to the office of Mr. H. M. Furman, also of counsel for the prosecution, to tell him in regard to the motion, and learned that said attorney was also out of the city, upon which said assistant county attorney said that he did not like to make any positive agreement as to the setting of the motion in the absence of his associate counsel, but that he knew of no reason why said motion should not be set as requested; upon which said attorney, B. G. Johnson, said to said assistant county attorney that he, said Johnson, would go to see the judge regarding the matter, to which said assistant county attorney replied, Yes; see the judge, and whatever he says about the matter will be all right; upon which defendant's said attorney went to the room of your honor, about one mile from the court-house, where your honor has been ill for some time, and then stated the matter to your honor; upon which your honor replied, "Whatever will suit you- attorney will suit the court in the matter;" and understanding from all of said conversations that it was agreeable to all parties, as well as to the judge, that the motion for new trial be set for next Monday, November 4th, said attorney, Johnson, wrote to his associate counsel, Senator S. C. Upshaw, who resides in Hillsboro', in Hill county, Texas, that said motion would not be called up before said date; that while no positive agreement was made, still that said detailed conversations caused said attorney, B. G. Johnson, to believe that a hearing of said motion would not be insisted upon on this morning, and that defendant's counsel was not informed until after 9 o'clock this morning that the prosecution would demand a hearing of said motion on this particular morning; that said motion has never been called before, because the judge of this court has, on account of sickness, not been on the bench since the trial of this cause until this morning; that defendant desires to amend his motion for new trial in many other material matters, and that he can have said affidavits and said motion for new trial ready to submit on next Monday; that defendant can prove all the facts as to said juror, Wilson, by the affidavits of said Walker,
107 Damron, and Mosely. Defendant will further show, in connection with said affidavits, that said juror, Wilson, swore on his *voire dire* that he had never formed or expressed any opinion whatever as to the guilt or innocence of the defendant, and that he had none at the time of his examination, and that said answers of said juror so given on his *voire dire* were false. Defendant further says that the papers in this cause have been absent from the district clerk's office ever since the 21st day of October, as he is informed by the clerk of the court, and that said clerk informs said attorney that said papers were in the hands of counsel for the prosecution; that defendant's counsel called for said papers last week for the purpose of amending his motion for a new trial, but found them not in the clerk's office; that defendant's said attorney is informed that said papers were returned to the clerk's office this morning. Defendant

further says that his attorney, Col. S. C. Upshaw, was so sick during the trial of this cause that he was unable to speak in the same, and that defendant is informed that his said attorney is now getting better, and that he will be able to assist in said motion for new trial by next Monday. Wherefore defendant moves the court to postpone the hearing of said motion for new trial until next Monday, or any day thereafter that the court may deem proper.

J. W. DAVIS.
B. G. JOHNSON.

Sworn to and subscribed before me this the 28th day of October, 1889.

L. R. TAYLOR,
District Clerk.

Filed October 28th, 1889.

L. R. TAYLOR,
District Clerk.

Order on Motion to Postpone, Oct. 28, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } 5563. October 28th, 1889.

This day this cause coming on to be heard on the motion of the defendant to postpone the hearing of the motion for new trial of this cause until next Monday morning, the 4th day of November, 1889, and the State appearing by her county attorney, the
108 defendant being present in his own proper person and by attorney, and the court after hearing the said motion and argument of counsel thereon and being fully advised in the premises, it is therefore considered, ordered, and adjudged by the court that the said motion be, and the same is hereby, refused, and that said motion for new trial of this cause be, and the same is hereby, passed until the 30th day of October, 1889, Wednesday; to which ruling of the court defendant excepts.

State's Counter-Affidavit No. 1. *Filed Oct.* 30, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } Indictment Pending in the District Court of Tarrant County, Texas.

Personally appeared Dunk Grant (col.), who, after being duly sworn, on oath says that he has heard read the motion for a continuance filed in the above case by the defendant, and that it is not true, as therein stated, that he was present and saw the difficulty between defendant, J. W. Davis, and B. C. Evans in which said Evans was killed. Affiant says that he never heard B. C. Evans threaten any one at any time, and that he knows nothing whatever of the circumstances of said killing or said difficulty; that at the

time of the killing of B. C. Evans affiant was eight miles out in the country, and did not hear of said killing until several hours after the said killing had taken place. Affiant further swears that he has resided in Tarrant county for thirty-eight years, and that he is the only Dunk Grant, colored, in Tarrant county; that he knows all of the colored people of Tarrant county, and that there is no other colored man residing in Tarrant county named Dunk Grant.

his
DUNK x GRANT.
mark.

Sworn to and subscribed before me by Dunk Grant on this the 9th day of October, 1889.

L. R. TAYLOR,
District Clerk, Tarrant County,
By J. M. COLLIER, *Deputy.*

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

109 *State's Counter-Affidavit No.* 2 (*S. M. Farmer*). *Filed Oct.* 30, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Personally appeared S. M. Farmer, who, being duly sworn, on oath says that he is marshall of the city of Fort Worth, and has held said office for three full terms and is now holding his fourth term of office as said marshall. Affiant further says that he has resided in Tarrant county for over ten years, and that during part of that time he has acted as deputy sheriff of said county. Affiant further says that he is extensively acquainted with the people of Fort Worth and Tarrant county. Affiant further says that on the 8th day of September, 1889, the counsel for the State in the case against J. W. Davis charged with the murder of B. C. Evans, applied to affiant to find out the whereabouts of a party called J. E. Soloman, who was claimed by the defense to be a witness in said case against Davis and to reside in Tarrant county. Affiant further says that as soon as said application was made to him he at once instructed all of the police of the city of Fort Worth to make diligent search for said J. E. Soloman, and that affiant also began to make diligent search for said party, not only in the city of Fort Worth, but also from persons in all parts of Tarrant county, and that neither affiant nor any of the police of the said city of Fort Worth have ever been able to find any one who has ever seen or heard of such a person as J. E. Soloman residing or being in Tarrant county, although affiant and said police have made diligent and thorough search for said party. Affiant has heard of a Joseph Soloman residing in Dallas county, but has never heard of any such party residing in or living

in Tarrant county, Texas. Affiant further swears that to the best of his knowledge and belief such a person as J. E. Soloman has never resided in Tarrant county, Texas. Affiant further swears that he is well acquainted with the negroes of Tarrant county, and that but one Dunk Grant (col.) resides in Tarrant county; that affiant has made diligent search and inquiry among the negroes of Tarrant county, and has caused the police of Fort Worth to make diligent search also for Dunk Grant (col.), and they have never found or heard of any other Dunk Gront (col.) save and except the Dunk Grant whose affidavit has been taken in this case.

S. M. FARMER.

110 Sworn to and subscribed before me by S. M. Farmer on this the 28th day of October, 1889.

L. R. TAYLOR,
District Clerk.

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

State's Counter-Affidavit No. 3 (*J. C. Young*). *Filed Oct.* 30, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Personally appeared before me, the undersigned authority, J. C. Young, who, after being duly sworn, deposes and says that he has heard said defendant's motion to postpone the hearing of the defendant's motion for a new trial, a part of which motion is as follows: "Because he has on this day discovered by credible information that a few days prior to the trial of this cause one D. F. Wilson, who was one of the jurors who tried this case, stated to and in the hearing of James Walker and Dr. Damron, who reside at Azle, in Tarrant county, and to Billie Mosely, who resides in Tarrant county, all of whom reside about twenty miles from Fort Worth, that the defendant, J. W. Davis, was guilty of a bloody murder in killing B. C. Evans, the deceased, and that the defendant, J. W. Davis, ought to be hanged for said murder, and that James Young, a credible citizen of Tarrant county, on this morning informed defendant's counsel of said facts and of the further fact that said parties named will make affidavits of said facts if called upon to do so." Affiant says that said statement, so far as he is concerned, is wholly untrue and false, both in substance and in fact. Affiant says that he never gave any such information to defendant's counsel or to any other person. Affiant says that he never heard James Walker, Dr. Damron, and Billie Mosely or either of them make any such statements. Affiant has never talked to either of said parties about the case. Affiant does — know Billie Mosely, except that he knows there is such a person. If affiant ever met Billie Mosely he does not now remem-

ber it. Affiant further says that he knows nothing about the
111 case. Affiant further says that he is generally called James Young, and that on yesterday morning he was in the court-house, in the city of Fort Worth, when B. G. Johnson, attorney for defendant, J. W. Davis, was writing some papers just before the motion for new trial came up. (Affiant says this because within a short time after he left the court-house H. M. Furman, one of the attorneys for the State in said cause, came to affiant on the streets of Fort Worth and stated to affiant the substance of defendant's motion as above set forth, and also stated that B. G. Johnson, attorney for defendant, had claimed to the court that affiant was his authority for said statements, and said Furman asked affiant if said statements were true.) Affiant says that B. G. Johnson came to affiant in the court-house, both before and while he was writing said paper, and asked affiant if he knew said Walker, Damron, and Mosely and if they would swear to the facts stated in said motion, and affiant then told said attorney that he did not know what they would swear, as he had not talked with them. Affiant says that this was in the morning, about 9 o'clock, and that very few persons were then in the court-house. Affiant says that he is the only James Young that lives near Azle.

J. C. YOUNG.

Subscribed and sworn to before me on this the 29th day of October, 1889.

J. H. SNODGRASS,
[SEAL.] *Notary Public in and for Tarrant County, Texas.*

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

State's Counter-Affidavit No. 4 (*D. F. Wilson*). *Filed Oct.* 30, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Personally appeared D. F. Wilson, who, after being sworn, on oath says: I was one of the jurors that tried J. W. Davis on the charge of murder. I live about 18 miles from Fort Worth, near Azle, in Tarrant county, Texas. Before I was taken on the jury I had heard very little about the case and had not formed any opinion as to the guilt or innocence of the defendant on the charge for which he was tried. I did not know the defendant or the deceased. I had heard two different rumors as to the cause of the killing, and did not know whether either of them was true. I had never heard any one talk of the case who
112 professed to know the facts. Soon after the killing of Evans I was in Walker's drug store, in the town of Azle. Mr. Walker and a number of other persons were there. Some one was

telling the rumors as to the killing. I do not remember just what was said. I stated that if the rumor was true that the man who killed Evans ought to have his neck broke. This was merely an idle remark and was not based upon any opinion I had about the matter, but was only a reply made in casual conversation and in reply to what some in the party had said. I paid no more attention to the matter and had forgotten what I had said until after the trial, when I was reminded of it. I did not know whether the rumor was true which caused me to make the remark. The party who was telling what he had heard was only repeating it as a flying rumor through the country. About a month after this I was at Reynolds Bros.' thrasher, in Tarrant county, and I again heard of the killing of Evans. Some one remarked that he had heard that the reason why Evans was killed was because he had ruined the character of the sister of the man who killed him. I then said, "If that is true he ought to have had his d—n head shot off." I did not know whether this rumor was true or not. My remark was not intended to express any opinion of mine as to the guilt or innocence of the defendant, but was only a reply to the statement about Evans having ruined a woman's character. When summoned and taken on the jury I did not have any opinion as to the guilt or innocence of the defendant. I had never heard what purported to be the facts of the case. I pay but little attention to flying rumors through the country, and never make up my mind about anything on them. I was not asked by either the State's counsel or the defendant's counsel as to whether I had ever made any expressions about the case. Defendant's counsel did ask me if I had heard the case discussed much, and I replied that I had heard but little about it, and that from what I had heard I had not formed an opinion as to whether the defendant was guilty or innocent, and this was the truth. My verdict was based solely upon the charge of the court and the evidence. I am a poor man and a laboring man, and my feelings are such that I would not convict a poor man for killing a rich man unless the case was such as required a conviction.

D. F. WILSON.

Sworn to and subscribed before me by D. F. Wilson on this
113 the 26th day of October, 1889.

L. R. TAYLOR,
District Clerk, Tarrant County,
By J. M. COLLIER, *Deputy.*

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

State's Counter-Affidavit No. 5 (*J. R. Walker*). *Filed October* 30, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

On this the 22nd day of October, A. D. 1889, personally came be-

fore me, Robert S. Blair, notary public in and for Tarrant county, Texas, J. R. Walker, who, being by me first duly sworn, deposeth as follows: That he resides in the town of Azle, Tarrant county, Texas, and is by occupation a druggist. He further says that soon after the killing of B. C. Evans I heard Frank Wilson (who was a juror in the case of The State of Texas *vs.* J. W. Davis) say in my drug store, in the town of Azle, that if what he, Wilson, had heard about the killing of Evans was true that the man who killed Evans ought to be hung. This was said in a casual conversation, a number of other persons being present. No one of those present professed to know anything about the facts of the case except from mere rumor. The said juror, Wilson, did not profess to know anything about the facts of the case except from rumor.

J. R. WALKER.

Sworn to and subscribed before me on this the day and date first written.

In witness whereof I have this day signed my name and affixed my official seal, this the 22nd day of October, 1889.

[SEAL.] ROBERT S. BLAIR,
Notary Public in and for Tarrant County, Texas.

James Walker, being duly sworn, further says that he has no recollection of ever having talked to James Young about the Davis case.

J. R. WALKER.

Subscribed and sworn to before me on this the 29th day of October, A. D. 1889.

J. H. SNODGRASS,
[SEAL.] *Notary Public in and for Tarrant County, Texas.*

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

114 *State's Counter-Affidavit No.* 6 (*J. W. Dameron*). *Filed Oct.* 30, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Personally appeared before me, the undersigned authority, J. W. Dameron, who says that he does not recollect what he heard D. F. Wilson, juror in the J. W. Davis case, say prior to the trial of said J. W. Davis.

J. W. DAMERON.

Sworn to and subscribed before me this 28th day of October, 1889

J. H. SNODGRASS,
[SEAL.] *Notary Public in and for Tarrant County, Texas.*

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

State's Counter-Affidavit No. 7 (*H. Mosely*). *Filed Oct.* 30*th*, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Personally appeared before me, the undersigned authority, Henry Mosely, who, being duly sworn, deposes and says: I am the father of Billy Mosely, and that about the time of the Davis trial my son Billy Mosely went to Azle, and on his return stated that while at Azle he heard Dr. Gordon say that Frank Wilson had said that if he was on the Davis jury he would hang him. He never heard Frank Wilson say it, but only heard Dr. Gordon say it. What Dr. Gordon told him was the first he had heard. This was on Sunday after the verdict was brought in. I think this was on the same day I heard of the verdict.

H. MOSELY.

Subscribed and sworn to before me this the 29th day of October, A. D. 1889.

J. H. SNODGRASS,
[SEAL.] *Notary Public in and for Tarrant County, Texas.*

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

115 *State's Counter-Affidavit No.* 8 (*W. F. Gordon*). *Filed Oct.* 30, 1889.

THE STATE OF TEXAS }
vs.
J. W. DAVIS. }

Personally appeared before me W. F. Gordon, who, being duly sworn, on oath says that he has no recollection of hearing D. F. Wilson, a juror on the J. W. Davis case, prior to the trial of said case make any statement whatever as to the merits or demerits of the case, nor does he remember to have heard said juror prior to the trial express any opinion about the matter.

W. F. GORDON.

Sworn to and subscribed before me this Oct. 28th, 1889.

J. H. SNODGRASS,
[SEAL.] *Notary Public, Tarrant County, Texas.*

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

State's Counter-Affidavit No. 9 (*D. F. Wilson*). *Filed Oct.* 30, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Personally appeared D. F. Wilson, who, after being duly sworn, on oath says that he has heard read the affidavit of W. N. Mosely, filed in this cause in support of defendant's motion for a new trial, and that it is not true, as is therein stated, that affiant ever said in the presence and hearing of said Mosely or any other person that affiant was disqualified from serving on said jury because he had formed an opinion as to the guilt or innocence of defendant, and that he had formed and expressed an opinion as to said matter, and that the defendant ought to be hung for the killing of Evans. Affiant says that statement of said Mosely is false, both in substance and in fact; that affiant had heard but little of said case prior to the time that he was taken on said jury, and that, as shown by affiant's affidavit now on file in this cause, that what affiant had heard and said was as much in favor of the defendant Davis as it was against him. Affiant here reaffirms all that is stated in his affidavit heretofore filed in this cause.

D. F. WILSON.

Sworn to and subscribed before me this the 30th day of October, A. D. 1889.

L. R. TAYLOR,
District Clerk.

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

116 *State's Counter-Affidavit No.* 10 (*Furman & Finger*). *Filed Oct.* 30, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Before the undersigned authority this day personally appeared H. M. Furman and Geo. W. Finger, who, being by me duly sworn, on oath say that in the examination of the juror W. B. Freeman said party said that he was not in the State at the time of the killing of B. C. Evans, and that he had heard but very little about the case, and that he had formed no opinion as to the guilt or innocence of the defendant, J. W. Davis, and that when the State said, We accept the juror Freeman, the defendant's counsel, S. C. Upshaw, promptly said, The defense accepts him also; and affiants further say that there was a large crowd present during the whole of the time occupied in the trial of said cause, and that nothing was said by any one present not engaged in the trial of said cause which would indicate on which

side of the case their sympathies were; that affiants assisted B. P. Ayers, the county attorney of Tarrant county, in the trial of this cause, and Mr. Ayers is not at this time in the city of Fort Worth.

HENRY M. FURMAN.
GEO. W. FINGER.

Sworn to and subscribed before me this 30th day of Oct., A. D. 1889.

L. R. TAYLOR,
District Clerk.

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

Assignment of Errors. Filed Nov. 23, 1889.

THE STATE OF TEXAS
vs.
J. W. DAVIS. } Assignment of Errors.

First assignment or error.

The order of the court calls for a special venire of one hundred men, and the original writ of venire shows that less than 100 men were drawn by the clerk and ordered by the writ to be sum-
117 moned by the sheriff, and upon this ground the order of the court overruling the defendant's motion to quash the venire is here assigned as error.

Order for venire, Transcript, page 127.
Writ of venire, Transcript, page 129.
Bill of exception No. 1, Transcript, page 48.

Second assignment of error.

The original venire as returned shows that fifty-five of the jurors named in the list now attached to the writ were not summoned, and the returns purporting to show why not summoned do not state the diligence used to summon them and are not signed by the sheriff nor by a deputy sheriff or constable, but by W. M. Rea, who made said return, and who was not at that time either one of said officers named, as fully proved by the record; and the order of the court overruling defendant's motion to quash the venire upon this ground is assigned as error. See—

Return to venire, Transcript, page 132.
Section 13 of second amended motion for new trial, sworn to, Transcript, page 98.
Commission of six deputies, Transcript, page 115.
Motion to quash venire, Transcript, page —.
Bill of exception No. 1, Transcript, page —.

Third assignment of error.

The State's counter-affidavit to defendant's motion to change venue does not negative the means of knowledge of each one of defendant's

compurgators nor impeach the credibility of the same, and upon this ground the court's action in overruling defendant's special exception to said counter-affidavit is assigned as error.

Names of compurgators, Transcript, page 139.
State's counter-affidavit, Transcript, page 140.
Special exceptions to same, Transcript, page 142.
Bill of exception No. 2, Transcript, page 49.

Fourth assignment of error.

The State's counter-affidavit to defendant's motion to change venue does positively negative the existence of a dangerous combination against defendant, but states at conclusion of said affidavit that "there is no such combination that affiant ever heard of," and for this reason the court's action in overruling defendant's
118 special exceptions to said counter-affidavit is assigned as error.

Counter-affidavit, Transcript, page 140.

Fifth assignment of error.

On his "*voire dire*" the juror B. F. Prickett testified as follows: "I have from hearsay formed an opinion as to the guilt or innocence of the defendant, and it would require evidence to remove said opinion, but that said opinion would not influence him in finding a verdict;" and the action of the court in overruling defendant's challenge for cause is here assigned as error.

Bill of exception No. 5, Record, page 68.

Sixth assignment of error.

On his *voire dire* the juror P. G. Davis testified that he had heard the killing of B. C. Evans talked about by several persons since the killing occurred, and had read accounts of it in the newspapers, and from what he had read he had formed in his mind the conclusion that a man by name of Davis killed B. C. Evans, and that that conclusion was now fixed in his mind, and that it would require evidence to remove it, and that said fixed conclusion would not influence his verdict; and the action of the court in overruling defendant's challenge for cause interposed against this juror is here assigned as error.

Bill of exception No. 6, Record, page 69.

Seventh assignment.

The juror J. A. Stewart testified on his *voire dire* that he had heard the killing of B. C. Evans talked about, and from what he had heard he had formed no opinion as to the guilt or innocence of defendant, but that from what he had heard he had formed the opinion that defendant had killed Evans, and that it would take evidence to remove that opinion, and that said opinion would not influence his verdict; and the action of the court in overruling the defendant's challenge for cause as to this juror is here assigned as error.

Bill of exception No. 7, Record, page 71.

Eighth assignment.

When examined on his *voire dire* the juror J. R. Brown stated that he resided in the city of Fort Worth, and did at the time of the killing of Evans, and had heard the matter talked about by several people since, and that from what he had heard he had formed an opinion as to whether defendant is the man who killed Evans,
119 and that he now has such an opinion, and that it would require evidence to remove it; and the action of the court in overruling defendant's challenge for cause against the juror is here assigned as error.

Bill of exception No. 8, Record, page 72.

Ninth assignment.

On his *voire dire* the juror A. McVeigh testified that from what he had heard his mind was made up as to the guilt or innocence of the defendant, and that it would require evidence to remove it; and the action of the court in overruling defendant's challenge for cause against this juror is here assigned as error.

Bill of exception No. 9, Record, page 73.

Tenth assignment.

The court failed to caution and administer to the sheriff the oath required by article 3056 of the Revised Statutes, when the sheriff was sent out to summon the 200 talesmen ordered by the court after the regular venire and jury for the week had been exhausted; and this action of the court is assigned as error.

Bill of exception No. 10, Transcript, page 74.

Eleventh assignment.

By the action of the court in overruling defendant's challenge for cause to the jurors Davis, Stewart, Brown, McVeigh, and Prickett defendant was compelled to exhaust his peremptory challenges on said jurors, by means of which defendant was compelled to take the objectionable juror, W. B. Freeman, as set out in the eleventh section of defendant's second amended motion for new trial, supported by affidavit of defendant and by all the evidence offered in support of the motion to change venue; and this injury to defendant is here assigned as error.

Twelfth assignment.

The juror D. F. Wilson, who was accepted and sworn and who served as a juror in this cause, was a disqualified, incompetent, and prejudicial juror, as shown by the affidavits of J. R. Walker, W. N. Mosely, and H. Mosely, as stated in full in section 12 of defendant's second amended motion for new trial; and the court's action in refusing a new trial upon this ground is assigned as error.

Second amended motion for new trial, Record, page 92.
Affidavit of J. R. Walker, Transcript, page 90.
Affidavit of W. N. Mosely, Transcript, page 91.
120 Affidavit of H. Mosely, Transcript, page 162.
Affidavit of B. G. Johnson, Transcript, page 111.

Thirteenth assignment.

This assignment calls attention of the court to the commission of six deputy sheriffs in and for precinct No. 1, and to the thirteenth section of defendant's second amended motion for new trial, supported by an affidavit showing that W. M. Rea, who signed the return to the special venire as deputy sheriff of Tarrant county, was not a deputy sheriff at that time, his commission being void.

Section 13, second amended motion for new trial, Transcript, page 98.

Commissions of the deputies, Transcript, page 115.

Fourteenth assignment.

The action of the court in refusing to allow defendant and his counsel time to get dinner and refreshments at the noon hour or at any other time during the first day of the trial of this cause, when one of the defendant's counsel was sick, was calculated to injure and impair the capacity of defendant and his counsel to properly conduct the defense of said cause, said attorney requesting such adjournment becoming so ill during the course of said trial as to be unable to speak in behalf of defendant on the argument of the cause before the jury, and said action of the court was also calculated to injure and prejudice the defendant upon his trial by creating upon the public mind the impression that defendant and his counsel were not in the favorable consideration of the court, and said action of the court is here assigned as error.

Section 14 of second amended motion for new trial, supported by affidavit of defendant and not denied by the State, Transcript, page 99.

Fifteenth assignment.

The action of the court in concluding the trial of this case in the night time under circumstances of great public excitement and prejudice against the defendant and over the objection and protests of the defendant *were* calculated to impair and defeat the defendant's right to a fair and impartial trial, and this action of the court is here assigned as error.

Section 15 of second amended motion for new trial, supported
121 by affidavit and not denied by the State, Transcript, page 100.

Sixteenth assignment.

At the conclusion of the prosecution the court, at half past nine o'clock at night, delivered his charge to the jury and retired them to consider of their verdict in the face of a great public demonstration in the court-house in favor of the prosecution, when the court on account of said public demonstration and the lateness of the night should have withheld said charge and adjourned court until next morning in order to allow rest to the jury and in order to avoid said public demonstration and excitement, all of which were calcu-

lated to injure the defendant's right to a fair and impartial trial and *is* here assigned as error.

Section 16 and 18 of second amended motion for new trial, sworn to by defendant and not denied by the State, Transcript, page 101.

Seventeenth assignment.

When the jury came into court at 10 o'clock at night in the face of said public demonstration and stated that they could not report a verdict on that night the court again retired said jury in charge of said cause and the papers thereof and allowed said court to remain open all night while said jury were *not* considering of said verdict instead of withdrawing said cause from said jury and adjourning said court until next morning, all of which proceedings were injurious and prejudicial to the defendant in his constitutional right to a fair and impartial trial, and this action of the court is especially assigned as error.

Section 17 of second amended motion for new trial, supported by affidavit of defendant and not denied by the State, Transcript, page 101.

Eighteenth assignment.

The great public demonstration in the interest of the prosecution manifested in the court-house during the night session of the court, by which the judge himself was compelled to interfere in behalf of defendant's counsel in order to compel the standing crowd packed in the aisles to permit said counsel to pass through the court-room to the bar of the court during the closing night speech of
122 counsel employed by the private prosecutors and by which demonstration the judge had to address said crowd from the bench and dismiss it with the assurance that no verdict would probably be returned on that night, though the jury were then out considering of their verdict, created an emergency for an immediate adjournment of the case until daylight, and the refusal of the court to stop said night proceeding was dangerous to the life of defendant and was calculated to and did injure him in his right to a fair and impartial trial and is here assigned as error.

Section 18 of second amended motion for new trial, Transcript, page 101.

Nineteenth assignment.

The testimony of the witnesses Terry King and of the defendant, Davis, and of the witness G. L. Harris demanded a charge, upon the law, of murder in the second degree, and the omission of the court to charge upon murder in the second degree is here assigned as error.

Section 19 of second amended motion for new trial, Transcript, page 103.

Twentieth assignment.

The testimony of the witnesses Terry King, J. W. Davis, and G.

L. Harris raised the issue of manslaughter and demanded a charge from the court, upon the law, of manslaughter, and the omission of the court to so charge the jury is assigned as error.

Section 20 of second amended motion for new trial, Transcript, page 103.

Twenty-first assignment.

The action of the court on the 28th day of October in overruling defendant's motion to postpone the hearing of the motion for new trial for one week and in allowing defendant's counsel only one day to travel twenty miles and return to procure the expected affidavits as to the juror Wilson, as set out in defendant's sworn application for postponement of said motion, was unreasonable, unjust, and prejudicial, as the present term of the district court of Tarrant county does not expire until the last day of the year 1889, and the record shows no reason for undue haste in disposing of the motion for new trial and is here assigned as error.

Motion to postpone, Transcript, page 149.

Bill of exception No. 11, Transcript, page 76.

123 Twenty-second assignment.

The charge of the court failed to define the term "malice aforethought" as used in the indictment and in the charge of the court, and fails to charge the jury that malice must have existed in the mind of the defendant for any time or particle of time prior to the act of killing, and this omission in the charge is assigned as error.

Section 22 of second amended motion for new trial, Transcript, page 103.

Twenty-third assignment.

The charge of the court fails to define to the jury the terms "express malice," but simply tells the jury that "express malice" is when one with a sedate and deliberative mind and formed design kills another, without drawing any distinction between express and implied malice, and this omission and charge are both assigned as error.

Section 23 of second amended motion for new trial, Transcript, page 103.

Twenty-fourth assignment.

The charge of the court fails to define implied malice, and thus fails to show the difference between express and implied malice in order to enable the jury to determine whether the killing was upon express malice or not, and yet tells the jury to determine whether or not the killing was upon express malice, and this omission of the court is assigned as error.

Section 24 of second amended motion for new trial, Transcript, page 103.

Twenty-fifth assignment.

In charging upon the law of self-defense the court failed to charge the jury that the appearance of danger must be viewed from the defendant's standpoint, in the light of all the surrounding circumstances, as they appeared to him, and this omission to charge is assigned as error.

Section 25 of second amended motion for new trial, Transcript, page 103.

Twenty-sixth assignment.

This assignment of error calls attention of the court of appeals to the great number of jurors exhausted before a jury was obtained in the case, and to the fact that defendant exhausted his peremptory challenges before the juror W. B. Freeman was presented
124 and sworn in the cause, and shows the facts which made said juror, W. B. Freeman, an objectionable juror, and the section of the motion for new trial setting out said facts is supported by the affidavit of the defendant and is not disproved by the State.

Section 26 of second amended motion for new trial, Transcript, page 104.

Bill of exception No. 15, page 79.

Twenty-seventh assignment.

This assignment of error calls attention of the court of appeals to the affidavits of the defendant set out in the motion for new trial, showing the day and hour when each of the proceedings complained of in the trial took place, the hour and minute when the verdict was received and filed, the proceedings of the night session, and the failure to withdraw the case from the jury during the night after the court and officers had left the court-house for the night, and this affidavit is not contradicted nor denied by the prosecution, and said proceedings of said night session are here assigned as error.

Section 27 of second amended motion for new trial, Transcript, page 104.

Twenty-eighth assignment.

The action of the court in overruling defendant's objections to the affidavits of Dunk Grant and S. M. Farmer, offered by the State in opposition to defendant's motion for new trial, was error, because said affidavits were an attack upon defendant's motion for a continuance, and were not admissible, because said affidavits do not attack the diligence used to procure the attendance of said witnesses, but attacks the merits of said application for continuance by *ex parte* affidavits without any opportunity on part of defendant to examine said witnesses in open court, and because said affidavits were filed and presented long after the trial was over and were calculated to prejudice the judge against the defendant in his decision upon defendant's motion for new trial.

Bill of exception No. 13, Transcript, page 78.

Affidavit of D. Grant, Transcript, page 153.

Affidavit of S. M. Farmer, Transcript, page 154.

Twenty-ninth assignment.

The action of the court in overruling defendant's objec-
125 tions to the affidavits of J. C. Young, J. W. Dameron, W. F. Gordon, and H. Mosely and in considering said affidavits when offered by the State against the defendant's motion for new trial was error, because they were all immaterial and irrelevant to the allegations contained in the motion for new trial, as said motion contained no allegations concerning said Young, said Gordon, or said Dameron, and the motion to postpone the hearing of the motion for new trial on account of information given by said Young, Gordon, and Dameron regarding the juror Wilson had been overruled by the court at a prior day of the term and had not been renewed when said affidavits, objected to by defendant, were filed and read to the court, and because said affidavits were calculated to prejudice the judge againt the defendant in deciding his motion for new trial, and the action of the court in receiving and considering said affidavits against defendant's motion for new trial *are* here assigned as error.

Bill of exception No. 12, Transcript, page 77.
Affidavit of J. C. Young, Transcript, page 156.
Affidavit of W. F. Gordon, Transcript, page 163.
Affidavit of J. W. Dameron, Transcript, page 162.

Thirtieth assignment.

The action of the attorney for the private prosecution in going to J. R. Walker and the juror D. F. Wilson and procuring their affidavits as to the conduct of the disqualified juror, D. F. Wilson, before the defendant had made any attack upon said juror and before said defendant had ever heard of such conduct of said juror or had an opportunity to consult with said witness was calculated to mislead and intimidate said witness and said juror and to forestall the defendant in his efforts to procure the affidavits of said witness in his behalf as to the conduct of said juror, D. F. Wilson, and said proceeding is here assigned as error.

Application to postpone, Transcript, page 149.
Affidavit of J. R. Walker, filed by State, Record, page 160.
Affidavit of D. F. Wilson, filed by State, Record, p-. 158 & 164.

Thirty-first assignment.

The record shows that on the 28th day of October the court granted defendant's counsel one day to go to the town of Azle, twenty miles distant from the court-house, to procure the affidavits of J.
R. Walker, Dr. J. W. Dameron, and Dr. W. F. Gordon as to
126 certain expressions and statements of the juror D. F. Wilson, made prior to the trial, showing him to be a disqualified and prejudiced juror, and that defendant's counsel in the afternoon of said day went in a buggy to said town of Azle, twenty miles distant, to see said witnesses, but the attorney for the private prosecution had gotten a buggy and started out in advance of defendant's counsel and had arrived at Azle ahead of defendant's counsel and

was there taking the affidavits of defendant's witnesses when defendant arrived in Azle, and had already taken the affidavits of Walker and Gordon before defendant's counsel arrived at the town, all of which proceeding was calculate to intimidate, confuse, and mislead said witnesses and to cause them to "fail to recollect what the juror did say," as appears from said affidavits of Drs. Gordon and Dameron, and because said proceeding was calculated to and did injure and forestall the defendant in his right to procure the evidence of his witnesses to said facts without any interference by the private prosecution of defendant, and said proceeding is assigned as error.

Application to postpone motion for new trial, Transcript, page 149.

Affidavit of B. G. Johnson, Transcript, page 111.

Affidavits of Drs. Gordon & Dameron, Transcript, pp. 162, 163.

Thirty-second assignment.

The offensive language used toward counsel for defendant by the attorney for the private prosecution in the closing speech in the face of the public demonstration in the court-room during the night session was entirely unprovoked, and caused a disturbance which required the interference of the judge to restore order, all of which conduct was calculated to increase the bad blood and public excitement of the standing crowd, then jammed into all parts of the court-room and behind the judge's desk, and to prejudice the jury against the defendant by causing them to believe that defendant was trying to clear himself by the falsehoods of counsel, while the record shows that defendant's counsel stated no facts to the jury at all; all which language was excepted to by S. C. Upshaw, of counsel for defendant, and is here assigned as error.

Bill of exception No. 14, Transcript, page 79.

Thirty-third assignment.

This assignment calls attention of the court of appeals to
127 the affidavits of R. C. Woodall, J. H. Gregory, W. O. Gregory, Jeff. Daggett, and B. G. Johnson, offered by defendant as part of his motion for new trial to contradict the affidavit of Dunk Grant, S. M. Farmer, and J. C. Young, read in evidence by the State, over defendant's objection, on the hearing of the motion for new trial, and the action of the court in overruling said motion is assigned as error.

Affidavit of R. C. Woodall, Transcript, page 106.

Affidavit of J. H. Gregory, Transcript, page 108.

Affidavit of W. O. Gregory, Transcript, page 109.

Affidavit of Jeff. Daggett, Transcript, page 111.

Affidavit of B. G. Johnson, Transcript, page 111.

Thirty-fourth assignment.

The evidence fails to show antecedent malice against B. C. Evans, and is therefore insufficient to convict of murder in the first degree,

and the whole record and every proceeding in this case proves that the defendant has been deprived of a fair and impartial trial, and the refusal of the court below to grant him a new trial is assigned as error.

Thirty-fifth assignment.

The court overruled the defendant's motion to change the venue after hearing defendant's motion and the evidence in support thereof and the State's counter-affidavit, and this action of the court is here assigned as error.

Bill of exception No. 3, Transcript, page 50.

Thirty-sixth assignment.

The court overruled the defendant's motion to continue the cause to the next term of the court on account of the absence of the testimony of D. Grant and J. E. Soloman, as set out in said motion, and this is assigned as error.

Bill of exception No. 4, Transcript, page 68.

BYRON JOHNSON,
S. C. UPSHAW,
W. M. PERRELL,
Attorneys for Defendant, J. W. Davis.

Filed November 23rd, A. D. 1889.

L. R. TAYLOR,
District Clerk.

128 *Request to Forward Transcript. Filed Oct.* 30, 1889.

THE STATE OF TEXAS *vs.* J. W. DAVIS. } 5563. Indictment Pending in the District Court of Tarrant County, Texas.

The clerk of the district court of Tarrant county, Texas, will please make out, as soon as possible, the transcript in the above case and forward it without delay to the court of appeals, now in session in the city of Tyler, Smith county, Texas.

B. P. AYRES,
County Attorney, Tarrant Co., Texas.

Filed October 30th, 1889.

L. R. TAYLOR,
District Clerk.

District Clerk's Certificate to Transcript.

THE STATE OF TEXAS, *County of Tarrant.*

I, L. R. Taylor, clerk of the district court in and for Tarrant county, Texas, do hereby certify that the foregoing transcript con-

tains a true and correct copy of all the proceedings in said above entitled and numbered cause.

Given under my hand and the seal of said court, at office, in the city of Fort Worth, Texas, this the 25th day of November, A. D. 1889.

[SEAL.]

L. R. TAYLOR,
District Clerk, Tarrant County, Texas.

129 I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing one hundred and twenty-eight (128) pages contain a full, true, and correct copy of the original transcript of the proceedings had in the district court of Tarrant county, Texas, in the cause of The State of Texas *vs.* J. W. Davis, upon the charge of murder, as filed in my office on the 29th day of November, A. D. 1889, and docketed in our said court of appeals as follows, to wit: No. 3329, J. W. Davis *vs.* The State of Texas, from Tarrant county; all of which is manifest from the records of my office.

In testimony whereof I have hereunto signed my name and affixed the seal of said court of appeals of the State of Texas, at my office, in the city of Tyler, Texas, on this the 2nd day of January, A. D. 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

130 *Motion for Certiorari.*

In Court of Appeals. Tyler Term, A. D. 1889.

J. W. DAVIS *vs.* THE STATE. } Motion for Certiorari to Bring Up Original Special Venire.

Now comes the State, by the assistant attorney general, in the above-entitled cause, and shows to the court that the transcript herein filed is imperfect in this, to wit: The return of the sheriff upon the special venire shows contradictory statements as to who of the venire were served and who were not served, and is calculated to leave the mind of the court in doubt as to what is meant by his said return on said special venire. It is also shown to the court — no transcript of said venire and return thereon can really make the truth appear as to the matters therein and thereon set forth, and that the clerk has not been at fault in copying the same. It is further shown that the reason for the apparent discrepancies and contradictions arising on said venire and returns thereon arose as follows, to wit: The clerk in issuing the original venire used two blank forms that had been prepared to be used in cases where 60 men or jurors were to be summoned on venires, and pasted or attached these two together in order to have space for the 100 names issued for in this case, and in doing this some of the old printed matter was shown at the intersection of the two blank forms thus pasted or attached; all

of which will be made to more fully appear by the affidavit of the sheriff of Tarrant county, hereto attached and made a part hereof. It is also shown that no certified copy of the original venire can be made more accurate than that already sent up in the transcript, and that in order for this court fully and fairly to understand the questions raised by appellant in his motion to quash the original venire and return thereon this court should have the said original venire and return thereon before it for the court's inspection in passing upon the appellant's motion to quash the same. Wherefore, the premises considered, it is prayed that a certiorari or other proper order forthwith issue from this court, commanding the clerk of the district court of Tarrant county, Texas, to forward to this court, for this court's inspection and without delay, the original venire issued on the trial of this cause in the court below, together with the
131 sheriff's return thereon, properly identified as such original papers by a proper certificate of said clerk in identifying the same.

W. L. DAVIDSON,
Ass't Att'y Gen'l.

THE STATE OF TEXAS
vs.
J. W. DAVIS.

Personally appeared J. C. Richardson, who, after being duly sworn, on oath says that he is the sheriff of Tarrant county, Texas, and has been sheriff of said county since the — day of November, 1888. Affiant further says that the original special venire in the above case, a copy of which appears on pages 129, 130, 131, 132, 133, & 134 of the transcript of said cause, upon appeal to the court of appeals of Texas, was not issued upon one piece of paper, but was written and printed upon two pieces of paper pasted together, and that between the name of B. H. Starr, No. 60, and the name of Porter King, No. 61, in the return of the sheriff to said venire, on the piece of paper forming the top of said venire, was printed, "And the following-named persons not found in — county after diligent search, to wit," as will appear by an inspection of page 132 of said transcript, and after the name Calvin Spear, No. 98, was printed on said piece of paper, constituting the top of said venire, "sheriff — county, by ——— ———, deputy;" that upon an inspection of the copy of said special venire contained in the transcript it might appear that said printed matter constituted a part of the return of the sheriff to said venire, but that upon an inspection of the original venire it will clearly appear that said printed matter does not constitute a part of his said return, and that in truth and in fact said printed matter did not constitute a part of his said return to said special venire.

J. C. RICHARDSON,
Sheriff, Tarrant Co., Texas.

Sworn to and subscribed before me this the 26th day of November, 1889.

L. R. TAYLOR, *Dist. Clerk.*

Endorsements: 3329. Mo. 910. J. W. Davis *vs.* The State. Tarrant county. Motion for certiorari. Filed Nov. 30th, 1889. E. P. Smith, clerk. Filed in court of appeals Apr. 24, 1890, at Austin, Texas. P. Walton, clerk.

132 I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing two pages contain a true and correct copy of the original motion for certiorari in the cause of J. W. Davis *v.* The State of Texas on file in my office.

To certify which I hereto sign my name and affix the seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of the State — Texas.

133 *Answer to Motion for Certiorari. Filed November* 30, 1889.

J. W. DAVIS *vs.* THE STATE. } Replication to Motion for Certiorari to Bring up Original Papers.

Now comes J. W. Davis, the appellant in the above cause, by his attorney, B. G. Johnson, and objects to the motion for certiorari on the following grounds:

1. Because said motion shows upon its face that the copy of the venire and the return thereto as contained in the transcript are correct copies of the original venire and return as they appear in the original papers.

2. That the allegations in the appellee's motion for certiorari show that a certiorari to the district court to correct the transcript would not alter the record as it now stands, said transcript being now correct.

3. Defendant also objects to the affidavit of J. C. Richardson, sheriff of Tarrant county, in this case, because he says that the intention of the sheriff in refusing to amend said return to the venire after leave of the court had been granted to do so cannot be examined by this court.

4. Because the record shows that the sheriff had leave of the court to amend said return in the court below, but declined to do so.

5. Because the fact of said sheriff's return being partly in printing does not affect the validity of said return.

B. G. JOHNSON,
Att'y for Appellant.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above matter on this page contains a true and correct copy of appellant's answer to motion for certiorari on file in my office among the papers in said cause of J W. Davis *v.* The State of Texas.

Given under my hand and the seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

134 *Order Submitting Cause, November* 30, 1889.

J. W. DAVIS *vs.* THE STATE. } 910, 3329. Appeal from Tarrant County.

The assistant attorney general submits a motion, writ of certiorari, and appellant submits an answer thereto, and the cause submitted on oral argument and briefs for both parties.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above matter on this page contains a true and correct copy of an order of the hon. court of appeals of the State of Texas made in the above-stated cause of J. W. Davis *v.* The State of Texas on the 30th day of November, 1889, as appears from the records of my office.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

135 *Judgment of Court of Appeals, Dec.* 12, 1889.

J. W. DAVIS, Appellant, *vs.* THE STATE OF TEXAS, Appellee, } 3329. Appeal from Tarrant County. Opinion by J. M. Hurt, Judge.

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is ordered, adjudged, and decreed by the court that the judgment be in all things affirmed, and that this decision be certified below for observance.

I certify the above on this page to be a correct — of the judgment of the court of appeals of Texas in said cause of J. W. Davis *v.* State of Texas as appears of record in my office.

Witness my hand and seal of office this Jan'y 2, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Opinion of Court of Appeals. Filed Dec. 12, 1889.

J. W. DAVIS *vs.* THE STATE. } No. 3329–1. Appeal from the Dist. Court of Tarrant County.

This is a conviction for murder of the first degree, the penalty being death. The counsel for appellant makes 36 assignments of error. We have had the benefit of argument in support of several of these supposed errors, and we have carefully read the record and brief for appellant. The conclusion reached is that there is no such error in this record as requires a reversal of the judgment. We desire to discuss but one question. To discuss all the assignments would require the writing of a small volume, which we have not the time to write, remarking, however, that each assignment has received our most careful examination. To support the conviction the State relies upon two aspects of the case, and contends that if either be true the judgment should stand. First, that Evans was sitting in a chair reading a newspaper, when appel-
136 lant approached him, spoke to him, and before Evans arose, with the paper still in his hand, fired and killed him; that the killing was with a calm, sedate mind and formed design. Second. Conceding appellant's version to be true, to wit: "That between nine and ten o'clock of the morning of the day of the homicide deceased came down in the store and commenced talking with Davis, and said: 'Mr. Davis, I don't think I will need your services any longer than the 15th; that this is not all; I have it from the very best information that you have been too intimate with a lady in the house;' defendant replying, 'What lady is that?' Evans saying, 'It is enough for you to know that you quit on the 15th,' walking off; Evans leaving and defendant commenced waiting on customers. In the afternoon, Evans being in his office sitting in a chair, defendant went to him and said, 'I think I have a right to know what lady you have reference to.' Evans answered, 'Davis, you know well enough who I refer to; that Mrs. Randle and Mrs. Rafferty are no better.' Defendant answered, 'I say, Mr. Evans, if you make that accusation you are a liar.' Evans, replying, 'You are a God damn liar,' raised up and advanced toward defendant, throwing his hand to one side, as if to draw a pistol, when Davis shot him." Admitting, we say, that the above facts are true, the State contends that then other facts and circumstances demonstrate that appellant sought Evans, revived this matter relating to the women for the purpose of provoking a difficulty, in order for a pretext to kill Evans; that with a cool, calm, and deliberate mind the provocation was given or the occasion was produced, and hence there was no murder of the second degree in the case. We have stated the positions of the State with a view to the discussion of the only question we desire to notice. Under the state of case presented by the testimony of appellant, counsel for him contending that the court should have submitted to the jury the question of murder in the second degree, was it in the

case? Counsel insists that it was and hence that there was error in the charge, because it failed to submit the degree of homicide to the jury. The learned judge submitted the question of self-defense, but did not submit to the jury but one degree of murder, viz., the first. There was no objection to the charge for this omission, nor did counsel request an instruction upon the second degree. We have reversed a great number of judgments, in all manner of felony cases, for this omission, though there was no charge requested
no objection taken, because of the omission to charge the law
137 applicable to the different phases of the case. But, in the absence of requested charges or objection, what is the rule? We are discussing the matter upon the hypothesis that murder of the second degree is presented by some evidence in the record. The rule is stated in Bishop *vs.* The State, 43 Tex., 390, to be that if the charge is erroneous and is excepted to at the time the judgment will be reversed; but, though erroneous, if not excepted to or proper instructions requested, the judgment for this error may or may not be reversed. If the omission was a material error, calculated to injure the rights of the defendant, though the error is called to the attention of the court first in a motion for new trial, the judgment should be reversed; but in determining whether the error is material and calculated to injure the rights of the accused we are to look to the whole record bearing upon the subject. What was the nature of the testimony supporting the verdict? Was it cogent and overwhelming? What the character of the testimony presenting the phase or theory of the case omitted to be noticed in the charge and upon which omission error is assigned? Was it at all reasonable? Did it present a theory which a reasonable mind could entertain, or was it supported by such testimony as was remotely calculated to destroy the State's case? When considered in connection with the other testimony in the case, as well as the charge as a whole, was the phase of the case simply an addition to the case as made by the State and consistent therewith, or was it in direct conflict with the State's theory? These are all important matters to be considered in passing upon the materiality of the omission or error so as properly to determine whether the error was calculated to injure the rights of the accused. What, then, was the nature of the State's evidence in support of murder of the first degree? We will not repeat the testimony, but will say that upon the first phase of the State's case it is almost absolutely demonstrated, not only by positive evidence of several witnesses, but by all the surrounding facts, that this was a calmly and deliberately planned assassination; that the appellant, with a cool and deliberate mind and previously formed design approached Evans, who was sitting in a chair reading a newspaper, and, before he could rise, shot him, an unarmed man, and continued to shoot until he was, in a manner, dead. Upon the second phase of the case the surrounding facts places it beyond contradiction that appellant, if what he says is true,
calmly and deliberately provoked the difficulty, produced the
138 occasion, with but one single purpose, and that was to obtain a pretext to slay the deceased. All the facts not only tend

this way, but form a mighty torrent moving irresistably to this conclusion. Now, then, this being the nature of the evidence in support of the second phase of the case contended for by the State, we can concede that what appellant swears was true; and still, as he calmly and deliberately adopted this method to provoke the difficulty or produce the occasion with intent to slay his victim, there is not only no self-defense in this case, but there is no murder of the second degree, and in view of the facts, the cogency of the facts, the overwhelming conclusiveness of the facts in support of murder of the first degree, if a charge had been submitted permitting the jury to find a less degree no juror with the least degree of intelligence, unless corrupt, would have entertained for a moment the suggestion of any theory less than murder of the first degree. The plain, simple truth is that an honest, conscientious man cannot read this record without concluding that appellant's version of this case was sheer fabrication; but it may be insisted by counsel for appellant that his version may be true, and that he may not have provoked the difficulty or produced the occasion for the purpose of killing deceased, and hence that this was a question for the jury; that the jury should have been permitted under proper instructions to pass upon this matter; that while the jury might not have believed that he acted in self-defense they may have believed his version of the facts and found him guilty of murder of the second degree. It is possible that the jury may have believed that appellant's theory was true, and it is possible that they may not have believed that he provoked the difficulty or produced the occasion to have a pretext to slay the deceased, and it may have been possible that murder of the second degree would have been the verdict; but there was not the most remote probability that the jury would have done any of these things, and hence there is not the slightest probability that appellant was injured by the omission. Now, if counsel for appellant had objected to the charge of the court for the omission to charge murder of the second degree, or had requested a charge upon that degree and it had been refused, there being some evidence tending to present this degree of homicide, we might have been required to reverse the judgment. This, however, is quite doubtful, because
appellant's theory of the case tends only to meet the State's
139 first phase of the case mentioned above, leaving the second
position of the State unquestioned—that is, that appellant calmly, deliberately, and very cautiously provoked the difficulty or produced the occasion for but one purpose—to kill the deceased. As above said, we have carefully examined the record in the light of the argument and brief of counsel for appellant and in view of the awful verdict and judgment in this case, but we have failed to find an error requiring a reversal of the judgment. We have not discussed but one question presented in the record, but we have given to all the others a most careful consideration, and we do not believe any of the assignments present an error for which this judgment should be reversed. The judgment is affirmed.

J. M. HURT, *Judge.*

Endorsements: 3329–1. J. W. Davis *v.* The State. Opinion. Affirmed. Filed in court of appeals at Tyler Dec. 12, 1889. E. P. Smith, clerk. Filed in court of appeals Apr. 24, 1890, at Austin, Texas. P. Walton, clerk. Hurt, J.

I certify the foregoing from the middle of page 135 to the last line above this certificate to be a correct copy of the court of appeals of Texas opinion in the cause of J. W. Davis *v.* State of Texas, of record in my office.

Given under my hand and seal of office, at Tyler, Texas, Jan'y 2, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Appellant's Motion for Rehearing. Filed Dec. 20, 1889.

J. W. DAVIS *vs.* THE STATE. } Appeal from Tarrant County. Appellant's Motion for Rehearing.

Comes now the appellant in the above cause and moves the court to reconsider the judgment of affirmance in this cause rendered at a former day of this term of the court, and to grant appellant a rehearing in this cause upon the grounds hereinafter set forth, the appellant also asking the privilege to amend this motion under leave of the court before the subdivision thereof; and owing to the number of the errors assigned, rendering it impracticable to argue all of said assignments on the original hearing, and owing to the further fact that this is a case in which the death penalty has been assessed in the court below, and that this is the court of last resort in
140 this case, appellant humbly prays this honorable court to allow him the privilege of being heard in an oral argument upon all of said assignments by his counsel upon the submission of this motion for rehearing, said motion being set forth in the following statement of the case, the following assignments of error, and the propositions of law stated in support of each of said assignments in their consecutive order:

The appellant was indicted on September 10th, 1889, during the present term of the district court of Tarrant county, for the alleged murder of B. C. Evans, on the 6th day of July, 1889. On the 8th day of October, 1889, the case was sounded for trial. Appellant moved to quash the venire upon the reasons stated in the succeeding first and second assignments of error, and the motion was overruled and appellant reserved the point by bill of exception. Appellant next made a motion to change the venue upon both of the statutory grounds and upon other facts fully set out in said motion to change, and said motion was also overruled, appellant reserving the point by a bill of exception, which bill embodies all the evidence offerred by appellant in support of said motion, the State not resisting said motion by any evidence whatever. Appellant then filed

and presented his motion for a continuance to the next term, upon which the court below remarked that the motion was in strict compliance with the statute and good upon its face, but by virtue of the discretion vested in the court by the statute the court would overrule the motion; to which last three words appellant excepted and reserved his bill, and the cause went to trial. The trial was conducted under great public terror and excitement, and was concluded in the night time (excepting the delivery of the verdict) in the face of a great public demonstration, in keeping with the facts set forth and proved on motion to change the venue, the excited crowd filling the hallways, stairways, entrances, windows, and aisles of the district court room, and inside the bar dock, and behind the judge's bench, and behind the railing inclosing the clerk's desk, so solidly packed and jammed together as to render it impossible for even counsel for the prisoner to pass to the bar of the court through the centre aisle of the court-room without the protection and assistance of the district judge, which was rendered by proclamation from the bench, commanding the dense crowd to stand back and allow defendant's counsel to pass to the bar of the court in order that the trial might proceed, and after the jury had been sent out between 9 and
141 10 o'clock at night to consider their verdict the public excitement in the court-room became so great that the district judge found it necessary to address the crowd from the bench and to "dismiss it with the assurance that no verdict would probably be rendered during the night," although the jury were still out considering of their verdict. These facts are all proved by affidavit referred to in the 18th assignment of error, and are not denied nor controverted by the State. The court remained open all night, the case remaining in the hands of the jury until the next morning at eight minutes after ten o'clock, when the jury rendered a verdict of murder in the first degree, fixing the punishment at death. Appellant saved all points as to improper proceedings for the consideration of the court of appeals and had the same certified by his bill of exception, appearing in the record by numbers from one to fifteen, which the attorney for the private prosecution states in his brief is an indication that we are scared. Appellant presented his first and second amended motions for new trial, which were promptly overruled, and the defendant excepted and appealed upon thirty-six assignments of error, bearing consecutive numbers in the record. The "blood and thunder," "lady poetry," and "flower garden" speech contained in the brief of the able counsel for the private prosecution is intended for the midnight crowd in the district court room, and as we have left it and the bitter prejudice, the feverish excitement and public clamor for blood, behind us, and defending the law and the sacred trust of human life confided to our hands, we now stand up as lawyers before the bar of the State court of appeals, where we will proceed to argue the grave questions of law which come up to us in the assignments of error, presenting and briefing each assignment in the order and number in which it occurs in the record:

First Assignment of Error.

"The order of the court calls for a special venire of 100 men and the original writ of venire shows that less than 100 men were drawn by the clerk and ordered by the writ to be summoned by the sheriff, and upon this ground the order overruling the defendant's motion to quash the venire is here assigned as error."

Argument.

The order of the court fixes the number of special jurors at one hundred (100), no more and no less, and the order commands
142 the clerk of the court to issue a writ of special venire to the sheriff, stating the names and the number of men that have been drawn in obedience to said order, which writ should command the sheriff to summon the same number of men specified in the order of the court. The statute says: "The clerk shall forthwith issue the writ in accordance with the order of the court." (Code Criminal Procedure, art. 608.) The clerk, however, it seems from the record, differed from the court as to the number of jurors that should be allowed the defendant in this case, and violated said order of the court by drawing and issuing a writ to the sheriff commanding him to summon sixty (60) jurors instead of one hundred (100), as ordered by the court, said writ reading as follows: "The State of Texas to the sheriff or any constable of Tarrant county, greeting: Whereas in the case of The State of Texas *vs.* J. W. Davis, the following-named sixty (60) persons have been selected in the manner provided by law to serve as special jurors, to wit (giving 60 names, and numbering said names from one to sixty, 60), therefore you are hereby commanded to summon each of the foregoing-named sixty (60) persons to serve as special jurors as aforesaid in the above-stated case." Said writ being signed by the clerk and under the seal of the district court. (See original writ of venire, on page 129 of the Transcript.) After this writ for sixty jurors had been by said clerk placed in the hands of the sheriff for execution, by some mysterious means, unknown to the prisoner, forty names appear to have been added to the sixty (60) ordered by the writ to be summoned; but recognizing the fact that he had been ordered by the writ to summon only the first-named sixty (60) jurors, the sheriff obeyed the writ and refused to summon the additional forty, and simply returned the writ, stating that the last-named forty men were not found in the county, stating no acts of diligence to find either of them. (See sheriff's return at the end of the first sixty numbers of jurors stated in the return and corresponding to the sixty ordered by the writ and running from No. 1 to No. 60, Trans., p. 132.) It also appears from the record that fifteen of the sixty commanded to be summoned by the writ were in fact not summoned, and the return states why they were not in the following words: "And the following-named persons not found in Tarrant county after diligent search at their houses and all over the county." (See the officer's statement of diligence at

end of sheriff's return to venire, at page 132 of the Transcript.)
143 But no act of diligence is stated as to the forty (40) extra names added after the writ was issued, the sheriff knowing that he was not commanded by the writ to summon any but the sixty (60) named and numbered in the original writ as issued to him by the clerk under the seal of the court. Appellant made a motion to quash the venire on the following grounds:

1st. Because the clerk had drawn and issued writ for a less number of jurors than was required by the order of the court.

2nd. Because the return to the writ shows no legal excuse for not serving the jurors who were not summoned.

3rd. Because the return does not state the diligence used by the sheriff to summon the jurors shown by the return to have been not served.

We submit that this motion should have been sustained.

What right has the district clerk to reduce the number of jurors ordered by the court from one hundred to sixty, and thus to deprive the prisoner of the right guaranteed him by the law to have the writ issued in accordance with the order of the court as laid down in the statute above quoted? When the court gives the prisoner one hundred men from which to select his jury by which he has to be tried for his life, what right or authority has the clerk of the court to say that he shall have only sixty men from which to select his jury? The additional forty names added after the writ was issued are no part of the venire, but if they were, then the motion to quash should have been sustained, because the return as to said forty men shows no act of diligence to find either one of said forty men, while article 614 of the Code of Criminal Procedure says: "If any of those whose names appear upon the list have not been summoned the return shall state the diligence that has been used to summon them and the cause of the failure to summon them," and the court of appeals has decided this rule to be imperative. (See Lewis *v.* The State, 16 Appeals, 646; also Wilson's Criminal Forms, 693.) The very fact that the officer made two separate returns to the writ—one return stating no diligence and no cause of failure to summon the forty men not commanded by the writ to be summoned, and another return as to the fifteen of the sixty named in the original writ and not summoned, "stating the diligence and cause of failure to summon them"—proves conclusively that the sheriff made no effort to summon the superadded forty men. As to the error of the clerk in drawing and issuing the writ for a smaller number of jurors than the order of the court commanded, the court of appeals has held that the statute regulating the
144 drawing and issuing the special venire shall be strictly complied with, according to the letter of the law, and that in a case in which the clerk had drawn and issued the writ for a greater number of jurors than the law specified, which, of course, was to the defendant's advantage in that case, while in this case the writ is for a smaller number than ordered by the court, and therefore the error is to the defendant's injury and disadvantage. (See Harrison *v.* The State, 3 Appeal Reports, 563, 564, and 565.) At the time the

Harrison case was tried the law fixed the number to be drawn on a special venire at not less than thirty-five nor more than sixty, while the writ in that case commanded the sheriff to summon seventy-five jurors. On account of this error the court of appeals reversed the case, using the following language in the decision of the court, delivered by Judge White, who is now presiding judge of the court of appeals: "We cannot imagine why the court, with the statute providing that a special venire shall consist of not less than thirty-six nor more than sixty persons, should have drawn and ordered seventy-five to be summoned. If some extraordinary emergency existed impelling the court to act independently of the plain letter of the law, certainly the record should at least disclose some evidence of it. We have searched the decisions of the courts of this country for a precedent upon this point and have found but one which is at all analogous to it (Gladden's case in the supreme court of Florida). In Florida, it seems, they have a statute relating to jurors, which requires that the county commissioners of each county shall make out a list of 300 names of persons qualified to serve as jurors, from which the grand and petit juries are to be drawn. In the case of Gladden *v.* The State it was shown, upon a challenge and motion to quash, that the county commissioners had furnished to the clerk a list of three hundred and two (302), from which list the jury was drawn which tried and convicted the defendant of murder. Chief Justice Randall, delivering the opinion of the court, says: "However unimportant the discrepancy may seem, we consider that the appellant had a right to demand a strict compliance with the law in the drawing and impannelling of a jury. Irregularities, however slight, when they show a departure from the provisions of law in respect to the selection, summoning, and empaneling jurors are proper grounds of objection to the jury and form ground of challenge to the array." (Gladden *v.* The State, 13 Florida, 626.) "It is not for us to speculate as to the reason
145 for limiting a special venire to not less than thirty-six nor more than sixty persons. Suffice it to say that until the law-making power of the State which established it sees fit and does repeal it district judges would do well to keep within the limits of the provision." * * * The quotation above, beginning at line 13, page 8, and ending with the last period, are the exact words of our court of appeals in the Harrison case and applies with double force to the first assignment of error in this case, because Gladden and Harrison had more jurors than the law allowed them, while the appellant, Davis, had forty less than were allowed him by the lawful order of the court. Our code of Texas says: "A special venire is a writ issued by order of the district court in a capital case commanding the sheriff to summon a certain number of persons required to be summoned, and the clerk shall (not may) forthwith issue the writ in accordance with the order of the court." (Code Criminal Procedure, arts. 605 and 608.) (See order for venire, Trans., page 127; writ of venire, Trans., page 129; bill of exception No. 1, Trans., page 48.)

Second Assignment of Error.

The original venire as returned shows that fifty-five of the jurors named in the list now attached to the writ were not summoned, and the returns purporting to show why not summoned do not state the diligence used to summon them and are not signed by the sheriff nor by a deputy sheriff or constable, as W. M. Rea, who made said return, was not at that time either one of said officers named, as fully proved by the record, and the order of the court overruling defendant's motion to quash the venire upon this ground is assigned as error.

Argument.

The statute provides that the return to the writ of venire shall be certified by the sheriff or the deputy sheriff to whom the clerk delivered the writ, and the return to this writ is signed by W. M. Rea, as deputy sheriff of Tarrant county. The commissions of the deputy sheriffs, set out at page 115 to page — of the Transcript, supported by the affidavit in section 13 of the second amended motion for new trial, at page 98 of the Transcript, which are not denied by the State, show that from the day the indictment was found in this case to the date of said motion there were six regularly appointed deputy sheriffs in and for this precinct (No. 1) of Tarrant county, and that no list of said deputies nor any of them has ever been posted up in the county clerk's office, and that the commission of said W. M. Rea, who made said return, was
146 not deposited nor recorded in the county clerk's office until the 10th day of October, 1889, two days after the motion to quash his return had been overruled. The acts of the Twenty-first Legislature (1889), chap. 30, p. 23, amending art. 4520, Revised Statutes, and approved April 6, 1889, provides as follows: "Every person so appointed deputy sheriff shall, before he enters upon the duties of his office, take and subscribe to the oath of office prescribed by the constitution, which oath shall be endorsed upon his appointment, * * * and such appointment shall be recorded and deposited in the office of the county clerk: Provided, however, that the number of deputies appointed by the sheriff of any one county shall be limited to not exceeding three (3) in the justice's precinct in which is located the county *site* of such county, and a list of these appointments shall be posted up in a conspicuous place in the clerk's office so that all can see them, and all sheriffs having more deputies than are provided for in this act shall make the number of his deputies conform to the provisions of this act." Now, as the number of deputy sheriffs in this precinct (No. 1) exceeds the limit of the law, and also because W. M. Rea had not filed or recorded his commission until long after he made said return, and as none of said appointments have ever been posted, as required by said law, then all of said appointments are null and void and the return to said writ of venire is void, and defendant's motion to quash for want of a sufficient official return should have been sustained. The law limits the

number of grand jurors to twelve (12), and this court of appeals has held in the following decisions that all indictments found by a grand jury composed of more than twelve men were a nullity and void, because a law of limitation means limitation, although the indictment is signed by only one of the illegal grand jurors and the return to the writ of venire is signed by only one of the illegal deputies. (Lott *v.* The State, 18 Appeals, 627; McNeese *vs.* State, 19 Appeals, 48; Smith *v.* State, 19 Appeals., 95; Rainey *vs.* State, 19 Appeals, 479; Williams *vs.* State, 19 Appeals, 625.) As to the facts regarding said return and said supposed deputy sheriff see returns to venire, Trans., page 132; section 13 of second amended motion for new trial, sworn to and not denied by the State, Trans., page 98; commissions of the six deputy sheriffs, Trans., page 115; motion to quash the venire, Trans., page 128; bill of exception No. 1, Trans., page 48.

Third Assignment of Error.

"The State's counter-affidavit to defendant's motion to
147 change venue does not negative the means of knowledge of each one of defendant's compurgators nor impeach the credibility of the same, and upon this ground the court's action in overruling defendant's special exception to said counter-affidavit is assigned as error."

Argument.

The men who swear to the counter-affidavit do not show by their affidavit that either one of them is personally acquainted with either of defendant's compurgators or their means of knowledge of the facts sworn to by them or their place- of residence, and while the motion to change venue was on hearing not one of the men who made said affidavit dared to go on the witness stand to testify about the facts stated in said affidavit, and the affidavit itself does not attack or impeach the affidavit of P. Marston, one of defendant's compurgators. The counter-affidavit attacks the means of knowledge of some man by the name of Martin, while defendant's compurgators are P. C. Caple, Calvin Spear, and P. Marston, showing that affiants who made said counter-affidavit did not even know the man's name and could not be acquainted with the means of knowledge as to the public sentiment regarding the case through the county. For these reasons the court should have sustained the defendant's special exception to said counter-affidavit. See "names of compurgators," Tr., p. 139; "State's counter-affidavit," Tr., p. 140; defendant's special exception to same, Tr., p. 142; bill of exceptions No. 2, Tr., p. 49.

Fourth Assignment of Errors.

"The State's counter-affidavit to defendant's motion to change venue does not positively negative the existence of a dangerous combination against defendant, but states at conclusion of said affidavit that 'there is no such combination that affiants ever heard of,' and for this reason the court's action in overruling defendant's special

exception to said counter-affidavit is assigned as error." (Counter-affidavit, Tr., p. 140.)

Argument.

The sworn motion to change venue filed by the defendant is required by law to state positive facts, and the motion in this case states positive facts. The same law requires the counter-affidavit of the State to positively negative the existence of the grounds for the change of venue stated by defendant, and unless each of the grounds is positively controverted by the counter-affidavit it is fatally defective. The counter-affidavit in this case does not positively
148 controvert the defendant's affidavit as to the prejudice existing in the county, and when it attempts to controvert the "existence of a dangerous combination against the defendant instigated by influential persons" the counter-affidavit concludes thus: "And there is no dangerous combination instigated by influential persons that affiants have ever heard of," while the men who made the counter-affidavit may not have even heard of the case until they were called upon to make the affidavit. This will not do. It is not the law. The special exception should have been sustained. (See State's counter-affidavit, Tr., p. 140.) 42 Tex., 360; 41 Tex., 148; 43 Tex., 415; 45 Tex., 148. (Bill of exception No. 2, Tr., p. 49.)

35th Assignment of Error.

"The court overruled the defendant's motion to change the venue after hearing the defendant's motion and the evidence in support thereof and the State's counter-affidavit, and this action of the court is here assigned as error."

Argument.

The sufficiency of defendant's application to change venue was not questioned. If the State had filed no counter-affidavit the district court would have been compelled by law to sustain the motion. The court, holding an issue to be formed by the affidavits, allowed the defendant to introduce witnesses in support of his motion. Defendant introduced 24 witnesses, all of whom testified to facts proving the allegations of defendant's motion—such men as L. N. Cooper, N. A. Stedman, J. A. Holland, Henry Finch, James S. Davis, Frank H. Smith, Eugene Pendery, the mayor of the city, Jas. W. Swayne, and other public men from all parts of the city and county—proving the allegations of the motion by such overwhelming testimony that the State virtually abandoned its resistance of the motion and introduced not a single witness in rebuttal, thus throwing the whole matter upon the court. It appearing, however, that the defendant's written motion to change the venue was signed and sworn to by only three men, while the State's counter-affidavit was signed and sworn to by a greater number of men, the district court held that the defendant's motion to change the venue had been killed by the State's written counter-affidavit and refused to allow argument or reading of law by appellant. This ruling was error, and has been

held both by the court of appeals and the supreme court. See Walker *v.* The State, 42 Tex., 376; Buford *v.* The State, 43 Tex., 418; Anschiks *v.* The State, 45 Texas, 150. The supreme court, in the above cases, expressly holds that the defendant's application to
149 change the venue cannot be killed nor affected by any number of counter-affidavits filed by the State, but that the affidavits affirming and denying simply make an issue as pleadings, and that the court must then hear the evidence of the witnesses offered by each side and then decide the motion according to the evidence. In the Walker case Chief Justice Roberts said: "Supposing the three persons supporting the defendant's application to be credible persons, as their credibility was not attacked, the law had been complied with, which, *prima facie*, gave him the right to have the venue changed. If that is allowed to be resisted and overborne by counter-affidavits of a negative character * * * made by a number of persons, the determination of his right to a change of venue would descend into a struggle between him and the district attorney to get the greater number of persons to swear for and against the application, and the stronger the prejudice against him the more certain would be his defeat if thus determined. If the persons supporting the application are not credible persons, or if the prejudice as sworn to by them does not exist, it may be shown by the proof of affirmative facts." * * * In the Walker case the defendant's affidavit was signed by three persons and the State's counter-affidavit by forty-nine persons. In our Davis case the defendant's affidavit is signed by three persons and the State's counter-affidavit is signed by 9 persons. In the Buford case, above cited, Justice Devine said: "A wide discretion is vested in the district judge in his action on a motion to change the venue. That discretion has its limits, and when the accused has complied with the law it requires substantial evidence to the contrary to authorize the refusal of that right expressly guaranteed by the Constitution and the Code of Criminal Procedure." The judgment was reversed, and the decision was concurred in by Justice Reeves, Justice Moore, Justice Gould, and Chief Justice Roberts, and both the Walker and the Buford cases have ever since been approved and followed by the court of appeals. In the case of Mensley *v.* The State, 9 Southwestern Reporter, 762, the court of appeals hold that the State has the right to introduce witnesses to prove facts tending to defeat the defendant's application to change or to contradict the witnesses offered by the defendant on the witness stand as to the facts testified to by them. We now invite the special attention of the court to the evidence offered by the defendant in support of his motion to change venue, as set out in full in bill of exception No.
3, page 50 of the Transcript, and to the bitter newspaper
150 articles therein contained, which no doubt gave rise to a great deal of the excitement and prejudice. Notice the circumstance as to the attempt to form mobs, the public indignation meeting at the court-house at night, and the indignant and inflammatory speeches there made against the defendant, and the cheering and applauding of the same by the angry and excited crowd at-

tending said meetings, in connection with the public excitement as demonstrated in the court-room during the night trial of the defendant, and we believe this court will hold that the motion to change venue should have been granted. It may be said that two or three of defendant's witnesses, on the motion to change, said that it was their opinion that he could get a fair trial in the county, but when asked for their reasons they all agreed that there was excitement and prejudice against the defendant, and some who thought he could get a fair trial had been attending the public indignation meetings at the court-house at night and making speeches. I desire to close this subject by quoting literally the language of Justice Gould, of our supreme court, in the decision of the case of Anschik *v.* The State, 45 Tex., 150: "It was not established that they (defendant's compurgators) had no such means of information as would justify their affidavits. It was not at all unreasonable that residents of the county-seat where the defendant resided * * * should know something of the state of the feeling toward him in the county at large. It appeared that the case * * * had been much talked of. There was a total absence of any affirmative fact regarding the truth of the (defendant's) affidavit. It is true that a number of citizens gave their opinions that the defendant could get an impartial trial in the county. If many more had testified to the same opinion this would have constituted no good ground for overruling the application (to change venue). Indeed, the testimony introduced in opposition to the change goes far, of itself, to show that the motion should have been granted. From that testimony alone it would seem unquestionable that at one time the prejudice had been very great and would have justified the affidavit. The existence of prejudice at the time of the trial was not denied by some of the witnesses, and their opinion as to the extent to which it had sibsided is but an opinion in which they are liable to be mistaken." The judgment was reversed, the decision being concurred in by Justice Devine, Justice John Ireland, Justice Reeves, Justice Moore, and Chief Justice Oran M. Roberts; and the cool, profound reasonong of these great old judges is worth more
151 to the law and good order of this country than all the midnight trials in the world. "Come, let us reason together," saith the Lord. "Whom the gods would destroy they first make mad." Pardon me. We submit that the motion to change venue should be granted. (Bill of exception No. 3, Trans., p. 50.)

36th Assignment of Error.

"The court overruled the defendant's motion to continue the cause to the next term of the court on account of the absence of the testimony of D. Grant and J. E. Soloman, as set out in said motion, and this is assigned as error."

Argument.

There was no question made below as to the sufficiency of the application for continuance either as to diligence or materiality of

the testimony, but the court overruled it, reserving the right to grant a new trial in case the expected testimony appeared from the testimony on the trial to be reasonable and probable. Therefore we will examine the last question before proceeding further. The application stated that said witnesses would testify, if they were present in court, that they were present when deceased was killed by defendant, and that said witnesses heard hard words pass between defendant and deceased in which said witnesses heard defendant say, "Mr. Evans, if you make that accusation you are a liar," and that Evans (deceased) replied in an angry manner: "You are a God damned liar;" and that at the same time the deceased sprang to his feet, threw his hand behind him as if to draw a pistol, and stepped toward defendant, and defendant immediately shot deceased. These facts were testified to by the defendant in person on the trial after detailing the balance of the conversation which had just occurred between himself and the deceased; and G. L. Harris, one of defendant's witnesses, and the only one present in court, testified to substantially the same facts on the trial. The State introduced Pres. Hollingsworth, Hugh Elliston, and W. R. McLaury to prove that no such words passed between defendant and deceased at the time of the shooting, but Hollingsworth and Elliston both testified that they were seventy feet away from the parties when the shooting occurred in the west end of the carpet store, and that they, Hollingsworth and Elliston, at the time the first shot was fired were standing with their faces in another direction from deceased, talking together over a bill which had come in, and that they were not looking in the direction of the deceased until after the first
152 shot was heard, and that their attention was first attracted to defendant and deceased by the firing of the first shot, and that they turned and looked and deceased was falling forward. They both testified also that if they had been listening or paying attention they could not have understood the words that were spoken, if in an ordinary tone, on account of the distance, but that they might have heard the voices and not have understood the words. However, the State put S. M. Farmer, Henry Gates, R. F. Stepp, and S. M. Smith on the witness stand, and they all testified that they rushed into the carpet store where deceased and defendant were just as the last shot was fired, and that Hollingsworth and Elliston were not in the store at all. They all swear that they looked carefully and not a man was in the store except deceased and defendant, and that S. M. Farmer arrested defendant. The said State witness testified that while he was there with deceased and defendant and the officer, Farmer, that he saw Hollingsworth "coming that way," which also proves that Hollingsworth was not there when the first shot was fired. These four witnesses were all State witnesses, and their testimony proves conclusively that Hollingsworth and Elliston were not in the store when the fatal shot was fired, and this does away with their testimony, leaving the testimony of defendant Davis and his witness, G. L. Harris, and the expected testimony of D. Grant and J. E. Soloman wholly uncontradicted, unless it be by the State witness, W. R. McLaury. Mr. McLaury swore that at the time of the shoot-

ing he was standing in a door across the street, east and twenty-five feet north from the store in which deceased was killed, and that he had heard deceased, Evans, say something to defendant before the shooting took place, but that he did not hear defendant say anything. He admits, however, on cross-examination, that on account of the distance he was away (about 100 feet, see diagram) words might have passed which he was not able to hear. Mr. McLaury also swears that he ran across the street to where the shooting occurred, and that he ran into the wrong store and had to go through and turn and come back into the carpet store where defendant and Evans were, and that he thought it was Hollingsworth being shot until he got over there and saw that it was deceased, Evans. This shows the uncertainty of Mr. McLaury's evidence. (See testimony of Sam. Farmer, Trans., page 37; testimony of Henry Gates, Trans., page 37; testimony of R. F. Stepp, Trans., page 42; testimony of S. M. Smith, Trans., page 40; testimony of W. R. McLaury, Trans., page 23.) Mr. McLaury is a good man and a perfect gentleman, but he was too far away and too much excited, as were many others at that time, to be certain about what was said between the defendant and the deceased. On the hearing of defendant's first amended motion for new trial, on the 30th day of October, the prosecution filed and presented two affidavits, attempting to show that defendant's absent witnesses, D. Grant and J. E. Soloman, were not in Fort Worth at the time B. C. Evans was killed (to which affidavits the defendant objected, as will be seen hereafter), and on the hearing of defendant's second amended motion for new trial, on the 18th day of November, defendant presented as a part of his motion the affidavits of J. H. Gregory, W. O. Gregory, R. C. Woodall, Jeff. Daggett, and B. G. Johnson, which affidavits prove beyond question, when considered together, that Grant and Soloman were in Fort Worth at the time of the shooting, and that they were present and heard the altercation between defendant and Evans at the time of the shooting, and that immediately after the shooting occurred both of said witnesses gave substantially the same account of the occurrence as was given upon the witness stand by the defendant. Affidavit of J. H. Gregory, Tr., p. 108; affidavit of W. O. Gregory, Tr., p. 109; affidavit of R. C. Woodall, Tr., p. 106; affidavit of Jeff. Daggett, Tr., p. 111; affidavit of B. G. Johnson, Tr., p. 111; testimony of Henry Finch, Tr., p. 33.

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Upon the rehearing in the case of Litt Hollis *vs.* The State, reported in the 9th Court of Appeals Reports, which we had the honor to argue before your honors, it was decided as to the probable truth of absent testimony that the statute does not mean that the truth of the absent testimony must affirmatively appear from the State's evidence on the trial, for that would be compelling the defendant to depend on the State's evidence to support his motion for a continuance, but that it means that it must not appear from all the other evidence to be unreasonable and improbable. After fully considering the defendant's sworn application for a continuance, the defendant's testimony on the trial, the testimony of G. L. Harris and Henry Finch on the trial, and the affidavits last above referred to,

will the court of appeals say that the defendant was not entitled to have his witnesses, D. Grant and J. E. Soloman, in court and under oath, where he could have examined them face to face and compelled them to testify to what they knew, under the protection of the court from outside influence and prejudice? Under every rule of right and law and justice we submit that the motion for continuance should have been granted. (Litt Hollis *v.* The State, 9 App., p. 643; bill of exception No. 4, Tr., p. 68.)

154 *Fifth Assignment of Error.*

"On his *voire dire* the juror B. F. Prickett testified as follows:

I have, from hearsay, formed an opinion as to the guilt or innocence of the defendant; that it would require evidence to remove that opinion, but that said opinion would not influence him in finding a verdict; and the action of the court in overruling defendant's challenge for cause is here assigned as error." (Bill of exception No. 5, Record, page 68.)

Argument.

The juror named in the above assignment of error shows by his evidence that he had his verdict made up without hearing the evidence, and that it would require evidence to remove or change his present verdict, and the district judge held him to be a qualified juror to try the defendant; and yet the Constitution guarantees to the defendant a trial by an "impartial jury." How can a man be an impartial juror when he swears that he will go into the jury-box without hearing the evidence, with his opinion ready formed as to the guilt of the defendant? This juror had the defendant already convicted and required him to unconvict himself, for he swears "that it would require evidence to remove that opinion." There can be no doubt that the juror was clearly disqualified from his own evidence, and the court of appeals has decided "that where the juror shows that he has formed a conclusion as to the guilt or innocence of the defendant, and that he still has such opinion, and that it would require evidence to remove it, the mere fact that the juror also swears that such opinion will not influence his verdict is not of potent significance; and where the competency of the juror is doubtful he should be excluded." Rothschild *v.* The State, 7 App., 519. The court of appeals has also said in another decision "that the better practice is to discharge a juror whose impartiality is questionable." Dreyer *v.* The State, 11 App., 631. The statement "that the juror has now established in his mind such a conclusion as to the guilt or innocence of the defendant as will require evidence to remove it" is equivalent to the statement "that he has now established in his own mind such an opinion as to the guilt or innocence of the defendant as will influence his verdict if said opinion is not removed by evidence." Any other solution would be illogical, for will a sane man say that established conclusions in his mind remaining forever unchanged will have no influence upon his action when he is called upon to act, one way or the other, in the matter

regarding which the conclusion has been formed? A horse
155 might say such a thing, but a human being, with sufficient sense and reason to be a qualified juror, would never do it. Maddox *v.* State, 32 Ga., 581; 79 Am. Dec., 31. "It rains, and the day is dark and dreary," but the rain and the darkness and the dreariness do not affect the light and the brightness of the day. Is that a logical proposition? Pardon me. The juror was clearly disqualified and the challenge for cause by the defendant should have been sustained. (Bill of exception No. 5, Trans., p. 68.)

Sixth Assignment of Error.

"On his *voire dire* the juror P. G. Davis testified that he heard the killing of B. C. Evans talked about by several persons since the killing occurred and had read accounts of it in the newspapers, and from what he had read he had formed in his mind the conclusion that a man by the name of Davis killed B. C. Evans, and that the conclusion was now fixed in his mind, and that it would require evidence to remove it, and that said fixed conclusion would not influence his verdict; and the action of the court in overruling defendant's challenge for cause interposed against this juror is here assigned as error."

Argument.

The argument presented upon the fifth assignment of error will apply with equal force to this assignment. Of course only one man by the name of Davis was ever charged with this offense, and, as the above-named juror formed his opinion from reading the newspaper accounts of the affair, and as said newspaper accounts are copied into the bill of exception No. 3, the court of appeals will see that the defendant, J. W. Davis, was the man referred to in the testimony of the juror P. G. Davis, who swears that said conclusion is now fixed in his mind, and that it would require evidence to remove it. Under the statutes, the decision of the court of appeals, and of the supreme court the juror P. G. Davis was certainly disqualified, and the action of the court in compelling the defendant to use a peremptory challenge against said juror is error. (Bill of exception No. 6, Trans., p. 69.)

Seventh Assignment.

The juror J. A. Stewart testified on his *voire dire* that he had heard of the killing of B. C. Evans talked about, and from what he had heard he had formed the opinion that defendant had killed Evans, and that it would take evidence to remove that opinion, and that said opinion would not influence his verdict; and the action of
the court in overruling defendant's challenge for cause as to
156 this juror is here assigned as error.

Argument.

The argument presented on the fifth assignment of error as to the juror Prickett will apply to the juror Stewart, named in the

above assignment. He swears that he heard the matter talked about, and had formed the opinion that the defendant had killed B. C. Evans, and that he still had said opinion, and that it would require evidence to remove it. This juror was surely disqualified, and the defendant should not be compelled to lose a peremptory challenge on said juror when he is on trial for his life. (Bill of exception No. 7, Trans., p. 71.)

Eighth Assignment.

"When examined on his *voire dire* the juror J. R. Brown stated that he resided in the city of Fort Worth and did at the time of the killing of Evans, and had heard the matter talked about by several people since, and that from what he had heard he had formed an opinion as to whether defendant is the man who killed Evans, and that he now has such an opinion, and that it would require evidence to remove it; and the action of the court in overruling defendant's challenge for cause against this juror is here assigned as error." (Record, p. 72.)

Argument.

The argument upon the fifth assignment of error applies also to the juror Brown, named in the above assignment. This juror, however, is more likely to be influenced by the opinion he swears he has formed, because he resides in the city of Fort Worth, among the people where so much prejudice and excitement has existed ever since the killing took place, and the simple fact that he swears that the opinion would not influence him is inconsistent and fallacious in itself. (Bill of Exception No. 8, Trans., p. 72.)

Ninth Assignment.

"On his *voire dire* the juror A. McVeigh testified that from what he had heard his mind was made up as to the guilt or innocence of defendant, and that it would require evidence to remove it; and the action of the court in overruling defendant's challenge for cause against this juror is here assigned as error." (Record, page 73.)

Argument.

This juror swears that his mind is made up as to the guilt or innocence of the defendant, and that it would require evidence to remove his conclusions. Is this the impartial jury guaran-
157 teed by the constitution? Suppose the whole jury was made up of that kind of men and they were sworn and seated in the jury-box. Their minds are all made up as to the only issue in the case, without even hearing the indictment read. Is that the kind of jury which the constitution provides as an impartial jury to try a man for his life? The supreme court and the court of appeals have not said so. We submit that the defendant should not have been compelled to spend a valuable peremptory challenge on this man in the face of all the evidence offered in support of the motion

to change the venue, showing that the whole county was prejudiced against him, which required an extraordinary degree of care in selecting a jury to try the case. (Bill of exception No. 9, Trans., p. 73.)

Tenth Assignment.

"The court failed to caution and administer to the sheriff the oath required by article 3056 of the Revised Statutes when the sheriff was sent out to summon the two hundred talesmen ordered by the court after the regular venire and jury for the week had been exhausted, and this action of the court is assigned as error." (Tr., p. 74.)

Argument.

Article 3056, Revised Statutes, prescribes the oath which the court is required to administer to the sheriff when he is sent out to summon jurors that have not been drawn on the regular venire, and the court of appeals has held the failure to administer the oath to be fatal error, and the district judge states in the bill of exception that he neither administered the oath nor cautioned the sheriff, as required by the statute, before the two hundred talesmen were summoned. (See bill of exceptions No. 10, Rec., p. 74.) Hicks *v.* The State, 5 App., 488; Myers *v.* The State, 22 App., 258.

Eleventh Assignment.

"By the action of the court in overruling defendant's challenges for cause to the jurors Davis, Stewart, Brown, McVeigh, and Prickett defendant was compelled to exhaust his peremptory challenges on said jurors, by means of which defendant was compelled to take the objectionable juror, W. B. Freeman, as set out in the eleventh section of defendant's second amended motion for new trial, supported by affidavit of defendant and by all the evidence offered in support of the motion to change venue, and this injury to defendant is here assigned as error."

Argument.

We are aware that the rule is that errors of the court in
158 overruling challenges for cause will not avail the defendant unless it is shown, first, that he exhausted his peremptory challenges; second, that after he had exhausted his peremptory challenges an objectionable juror was empaneled and sat upon the jury, and that he was a juror whom defendant would have challenged peremptorily had his peremptory challenges not been exhausted. The defendant could not challenge the juror Freeman for cause, because he qualified under the statute. He could not challenge peremptorily because he had exhausted his peremptory challenges. Therefore he was forced to take the juror without any right to object in any manner. The defendant, however, in the affidavit, set out in section 11 of his second amended motion for new trial that

said juror, W. B. Freeman, was an objectionable juror, and that defendant would have challenged him peremptorily if he had not exhausted his peremptory challenges. The affidavit, taken in connection with all the circumstances set forth in the motion to change venue and the evidence offered in support of the same contained in bill of exception No. 3, shows conclusively that defendant was injured in being deprived of his right to challenge said juror perempforily. Understand us, the juror would not be objectionable were it not for the facts set forth in the motion to change venue, the evidence in support of the same, and the affidavit of defendant set forth in section 11 of the second amended motion for new trial, which last is at page 95 of the Transcript. Holt *v.* The State, 9 App., 571; Loggins *v.* The State, 12 App., 65.

Twelfth Assignment.

"The juror D. F. Wilson, who was accepted and sworn and who served as a juror in this cause, was a disqualified, incompetent, and prejudiced juror, as shown by the affidavits of J. R. Walker, W. N. Mosely, and H. Mosely, as stated in full in defendant's second amended motion for new trial; and the court's action in refusing a new trial upon this ground is assigned as error." Second amended motion for new trial, Trans., page 92; affidavit of J. R. Walker, Trans., page 90; affidavit of W. N. Mosely, Trans., page 91; affidavit of H. Mosely, Trans., page 162; affidavit of B. G. Johnson, Trans., page 111.

Argument.

The juror D. F. Wilson, who served as a juror on the trial, swore that he had never heard the case talked about, and that he had never formed or expressed any opinion as to the guilt or innocence
159 of the defendant, and on account of said statement was accepted as a juror. After the trial defendant was informed of the facts set forth in the motion to postpone the hearing of the application for new trial, and procured and filed the affidavits of J. R. Walker and W. N. Mosely, which affidavits show that said juror had discussed the facts of said case with several persons prior to the trial, and that prior to the trial he had stated that if the facts which he had heard about the killing were true that the defendant Davis ought to be hanged for killing B. C. Evans, and after he had been summoned as a talesman in said cause he stated to W. N. Mosely, one of his fellow-jurors, while the work of selecting the jury was going on, that he, said D. F. Wilson, was not a "qualified juror to try defendant, because he had formed an opinion as to the guilt or innocence of the defendant, and that defendant ought to be hanged for killing Evans;" and it appears from the affidavit of H. Mosely, filed by the State, that said juror, Wilson, had made substantially the same statement to Dr. Gordon at another time and place. This juror was disqualified, but thrust himself upon the defendant by swearing falsely as to his qualifications. Even if the facts stated by the juror to Walker and Mosely and Gordon were not sufficient to

warrant a challenge for cause, yet the defendant swears in his motion for new trial that if his challenge for cause had not been sustained that he would have gotten rid of said juror by peremptory challenge had said juror disclosed said facts on his *voire dire*, which he did not do, although questioned closely as to all of said matters. This matter was especially injurious in this case on account of the great prejudice existing against defendant, which would tempt persons possessed of such prejudice to swear falsely to get on the jury in order to hang the defendant. The statements made by the juror to W. N. Mosely were made while the jury was being selected and after said juror and Mosely had been summoned as talesman and while they were waiting to be examined on their *voire dire*. In the case of Long *v.* The State, reported in the 10th Court of Appeals, a juror on his *voire dire* disclaimed all prejudice and any conclusion as to the guilt or innocence of the defendant, but on motion for new trial it was shown by affidavits that before the jury was fully empaneled said juror said, "I am a poor juror for the defendant," and the court of appeals held that a new trial should have been granted, because it was evident from that statement of the juror that he had sworn falsely and perpetrated a base deception on the defendant in order to get on the jury. On account of the disqualification of said juror and his conduct as shown by said affidavit, we submit that the court below should have set aside the verdict. (Long *vs.* The State, 10 Appeals, 186.) Affidavit of J. R. Walker, Trans., page 90; affidavit of W. N. Mosely, Trans., page 91; affidavit of H. Mosely, Trans., page 162.

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Thirteenth Assignment.

"This assignment calls attention of the court to the commissions of six deputy sheriffs in and for precinct No. 1, and to the thirteenth section of defendant's second amended motion for new trial, supported by affidavit showing that W. M. Rea, who signed the return to the special venire as deputy sheriff of Tarrant county, was not a deputy sheriff at that time, his commission being void." Section 13, second amended motion for new trial, Trans., page 98; commissions of the deputies, Trans., page 115.

Argument.

The facts and the law bearing upon the questions involved in the above assignment of error are fully argued under the second assignment of error at page 10 of this brief. W. M. Rea not being a deputy sheriff at the time he made and signed the return to the venire as deputy sheriff, said return is null and void and shows no excuse for failing to summon the absent jurors. The only power given the sheriff to appoint deputies is conferred in chapter 30, Acts of 1889, page 23, which repeals all other laws on the subject, and this act limits the number of deputies in the precinct in which the county-seat is located, and the sheriff has no right to violate this law.

Fourteenth Assignment.

"The action of the court in refusing to allow defendant and his counsel time to get dinner and refreshments at the noon hour or at any other time during the first day of the trial of this cause, when one of defendant's counsel was sick, was calculated to injure and impair the capacity of defendant and his counsel to properly conduct the defense of said cause, said attorney requesting such adjournment becoming so ill during the course of said trial as to be unable to speak in behalf of defendant on the argument of the case before the jury, and said action of the court was also calculated to injure and prejudice the defendant upon his trial by creating upon the public mind the impression that defendant and his counsel were not in the favorable consideration of the court, and said action of the court is here assigned as error." Section 14 of second amended
161 motion for new trial, supported by affidavit of defendant and not denied by the State, Trans., p. 99.

Argument.

Under the circumstances of public excitement and prejudice existing against the appellant at the time of the trial of this case the action of the court complained of in the above assignment of error was especially calculated to prejudice the appellant and to increase the prejudice already existing by creating the public impression that the defendant and his counsel were not entitled to any consideration or respect at the hands of the court, or that the purpose of the court was to rush the case through a hasty trial in order to save time, either one of which impressions was directly calculated to injure the appellant under the peculiar circumstances of this particular case. We know that the motives of the district judge were pure, and that when the judge and officers and the audience all took the recess of one hour and went to dinner, compelling the defendant and his attorneys to remain in the court-room at work during all that hour, the court intended no wrong to defendant or his counsel, but only intended to refuse them time for dinner and refreshments in order to hasten through the trial, but it was a direct injury regardless of the intention. S. C. Upshaw, the oldest one of the counsel for the defense, was sick at the time, and he it was who asked the court to give us time at noon for refreshments, which the court refused, and said counsel, growing worse, was so ill at the conclusion of the evidence as to be wholly unable to address the court or the jury in argument of the cause in behalf of the defendant, and this course was pursued by the court in the night trial, all of which is fully shown by section 14 of the second amended motion for new trial, Trans., p. 99, which is supported by the affidavit of the defendant and not denied nor controverted by the State. The record shows no emergency requiring any undue haste in the prosecution of the said cause, and that the next day after the conclusion of the night proceedings was an idle day in which nothing was done in

the court, showing plenty of time in which to try said cause properly. Counsel for defense are not complaining of the humiliation and punishment thus put upon them personally, but when the injury extends to the defendant and his right to an unprejudiced, fair, and impartial trial, then we enter our most earnest protest against it and say that it is wrong. (Second amended motion for new trial, section 14, Trans., p. 99.)

162 *Fifteenth Assignment.*

"The action of the court in concluding the trial of this cause in the night time, under circumstances of great public excitement and prejudice against the defendant and over the objections and protests of the defendant, *were* calculated to impair and defeat the defendant's right to a fair and impartial trial, and this action of the court is here assigned as error." Sec. 15 of second amended motion for new trial, supported by affidavit and not denied by the State. (Trans., page 100.)

Argument.

The facts regarding the night trial are fully set out in section 15 of the second amended motion for new trial, which facts are sworn to and not denied by the State. If the district judge ever had any doubts as to the truth of the matter set out in the motion to change venue, certainly such doubts were dispelled by the demonstrations of the populace at the court-house during the closing speech by the attorney for the private prosecution during the night session of the court. The district judge had been fully informed of the public excitement and the terrible prejudice existing against the defendant, not only by the full statement of said matter in the motion to change venue, which was sworn to by the defendant and three other credible citizens of the county, but also by the testimony of the witnesses in support of said motion, and on that account the court should not have hazarded the life of the defendant and the fairness of his trial by compelling the defendant to be brought out from jail at night to undergo the bitter invectives of the prosecuting attorney in the face of his enemies, who, as the record shows, came in crowds and throngs from all parts of the city and crowded and jammed into all the entrances, stairways, aisles, and windows of said court-house until there was not standing room in any part of said court-room. What were they there for if not to crowd upon the defendant and to show to the court and jury that the populace were solidly with the prosecution, and that the public sentiment was backing up the man who was to make the big speech at night which was to break defendant's neck? The speech was to be made in the night time, when the whole excited populace could have due notice of it, and would have nothing else to do but come in a mass and crowd into said court and show their approval and interest in the prosecution. The speech was to be made in the city where the people resided who had attempted to form mobs to lynch the defendant. The
163 speech was to — made against the defendant, not for him—

not one word for him—and by the employed attorney for the private prosecutors, who, it was expected, would use against the defendant the strongest language possible, and to make the most out of a night speech in a sensational trial, when he could not be replied to by defendant or his counsel, for it was the last speech in the case. The record shows that the district judge knew all these things. The crowd (as shown by the affidavit and not denied by the State) jammed the entrances and halls and aisles, the main court-room, standing and crowded against each other, in the doors and in the windows, up to the railing of the bar dock. Then, as they were jammed forward by the surging crowd behind, they climbed over the railing and crowded into the bar dock, all around the prisoner; then they moved around and behind the district judge and climbed up and stood in the large double window in the rear of the bench, where they could peer over the judge's shoulder at the prisoner and the jury, and where they could even read the judge's charge as he wrote it out. The affidavit further shows that when defendant's counsel attempted to enter said court-room counsel became jammed in by the surging crowd in the middle of the center aisle of the court-room, and was unable to move further, when he called to the district judge on the bench, invoking the powers of the court to aid counsel to pass to the bar of the court, where the prisoner was then hemmed and jammed in so that even his counsel could not get to him. The affidavit shows further that the judge responded to the call of defendant's counsel and from the bench ordered said crowd to give way, so that counsel could pass to the bar of the court so that the trial could proceed, the trial being itself thus obstructed by the crowd. It further appears from the affidavit that after the jury were charged and sent out at 9.30 at night the crowd remained packed in said court-room awaiting the verdict, until the excitement became so great that the judge of the court addressed the crowd from the bench, assured them that the jury would not probably return a verdict on that night, and dismissed the crowd, upon which a part of the crowd left the court-house, but the judge remained upon the bench until ten (10) o'clock at night waiting for the verdict of the jury. Why did the judge make such a statement to the crowd while the jury, — were then out, were expected in with the verdict every moment? Had not the judge at least realized the fact that in case the verdict should be in any way favorable to the defendant that it would be better to receive that verdict in the absence
164 of that crowd? Was it not merely throwing a tub to the whale, and was it not entirely justifiable for the judge to get the crowd out of the court-room the best and easiest way possible under the circumstances? It certainly was. Understand that counsel is not speaking against the honor or integrity of a single man or lady in that vast crowd, for some of them were the best citizens of the city; but it will be remembered, from the testimony of Judge Holland on the motion to change venue, that some of the best people of the city—even lawyers—who were otherwise conservative men, were among those who were advocating the mob against the defendant on the street only a few days before the trial. The great mis-

take of the court was made in holding the night session at all against the protest of the defendant and in failing to immediately adjourn the court until daylight when the court observed the increasing crowd and excitement. All of these facts were set forth in the defendant's first amended motion for new trial and in his second amended motion for new trial, sworn to by the defendant as true, and both of said motions were, in open court, on different days, read to the court in the presence of counsel for the prosecution, as shown by the record, and yet said facts have not been controverted or denied by the State. In the case of Steagald *v.* The State, 22nd Court of Appeals Reports, similar facts were sworn to by defendant in his motion for new trial and not denied by the State, and the court of appeals held that it was the proper practice, the statute giving the State the right to file counter-affidavits to controvert any matter stated in the motion for new trial, which the State had failed to do, and the conviction was set aside. (Steagald *v.* The State, 22 App., 492.) In a recent case before the court of appeals the court said: "In prosecutions for this and other high crimes which arouse public indignation and fire the minds of a community with a desire for vengeance against the guilty party the court and counsel should especially be scrupulously cautious to afford to the defendant a fair and impartial trial, as free as possible from excitement or prejudice, and no improper means should be resorted to to prejudice the minds of the jury against the defendant in the remotest degree." Bryson *v.* The State, 20 App., 566; Gazley *v.* The State, 17 App., 267.

Sixteenth Assignment.

"At the conclusion of the prosecution the court, at half past nine o'clock at night, delivered his charge to the jury and retired them to consider of their verdict in the face of a great public dem-
165 onstration in the court-house in favor of the prosecution, when the court on account of said public demonstration and the lateness of the night should have withheld said charge and adjourned court until next morning in order to allow rest to the jury and in order to avoid said public demonstration and excitement, all of which were calculated to injure the defendant's right to a fair and impartial trial and *is* here assigned as error." Sections 16 and 18 of second amended motion for new trial, sworn to by defendant and not denied by the State (Tr., p. 101).

Argument.

The foregoing argument upon the fifteenth assignment of error applies also to this assignment, as it relates to a part of the same proceedings and showing the same nature and weight of error. If it had been at the end of the term of court there would be some excuse for such hot haste to conclude the trial, but since the jury was completed only one day had been occupied with the trial when all these night proceedings took place. That was on the 10th day of October, and on the next day, which was Saturday, there was noth-

ing before the court, and the same term is still in session, as shown by the transcript in this case, and the term does not expire until the last day of December next, which certainly would have allowed more than one day and night to try a man for his life, and the record attempts to show no reason whatever, except public excitement, for rushing this case as has been done. The defendant has not had a fair and impartial trial, and it certainly cannot injure either the State or the private prosecutors in this case for the court of appeals to set aside the conviction and give him a fair trial, whether he be guilty or not guilty. The law—the law is the thing

Seventeenth Assignment.

"When the jury came into court at ten o'clock at night in the face of said public demonstration and stated that they could not report a verdict on that night the court again retired said jury in charge of said cause and the papers thereof and allowed said court to remain open all night while said jury were out considering of their verdict instead of withdrawing said cause from said jury and adjourning said court until next morning, all of which proceedings were injurious and prejudicial to the defendant in his constitutional right to a fair and impartial trial, and this action of the court is especially assigned as error." Section 17 of second amended motion for new trial, supported by affidavit of defendant and not denied by the State, Tr., p. 101.

166 *Argument.*

The foregoing argument upon the fifteenth and sixteenth assignments of error cover the questions presented in this assignment. There is no excuse shown whatever for these hasty and prejudicial proceedings, and we ask the court to consider them in connection with the facts stated in and testified to upon the motion to change venue as illustrating the extent of the great public excitement that attended this most remarkable trial. The jury should have been allowed the night in which to sleep and rest and refresh their physical and mental powers and faculties so as to be prepared on the next day to enter calmly and dispassionately upon their consideration of the case involving the life of the man who was then upon trial before them for the highest crime known to the law. Surely they should have been allowed the light of one day, at least one day, for the consideration of this great issue between life and death of a fellow-man, whom the law presumes innocent until the very moment that he is convicted. Shall the courts of justice of this country deal so lightly with human life as this? Even in war there is a rule that all battles shall cease at nightfall. The defendant has not had a fair and impartial trial.

Eighteenth Assignment.

"The great public demonstration in the interest of the prosecution manifested in the court-house during the night session of the

court, by which the judge himself was compelled to interfere in behalf of defendant's counsel in order to compel the standing crowd packed in the aisle to permit said counsel to pass through the court-room to the bar of the court during the closing night speech of counsel employed by the private prosecutors, and by which demonstration the judge had to address said crowd from the bench and dismiss it with the assurance that no verdict would probably be returned on that night, though the jury were then out considering of their verdict, created an emergency for an immediate adjournment of the case until daylight, and the refusal of the court to stop said night proceeding was dangerous to the life of defendant and was calculated to and did injure him in his right to a fair and impartial trial and is here assigned as error." (Sec. 18 of second amended motion for new trial, Trans., page 103.)

Argument.

The above section of defendant's second amended motion for new trial, setting out the facts stated in the above assignment of
167 error, was sworn to by the defendant and not denied by the State, and the principles of law bearing upon the facts set forth in said last assignment have been fully argued under the fifteenth assignment of error, hereinbefore set out, and is insisted upon here as a special illustration of the great prejudice and excitement attending said trial.

Nineteenth Assignment.

The testimony of the witness Terry King and of defendant, Davis, and of the witness G. L. Harris demanded a charge, upon the law, of murder in the second degree, and the omission of the court to charge upon murder in the second degree is here assigned as fundamental error. Section 19 of second amended motion for new trial, Transcript, page 103.

Argument.

The facts testified to by the State's witness, Terry King, the defendant's witness, G. L. Harris, the defendant, J. W. Davis, and the State witness Eckert are all perfectly consistent and prove the following conclusions: 1, that deceased, Evans, was the president of the corporation known as the "B. C. Evans Co.," engaged in the sale of dry goods, clothing, and carpets; 2, that defendant, Davis, was a clerk in the employ of said company in the clothing department; 3, that three certain ladies were also employés of said company and working in the same house with defendant; 4, that a relationship existed at the time between the defendant and one of said ladies consisting of a marriage engagement; 5, that about 10 o'clock on the morning of July 6, while appellant was quietly working in his department of the store, deceased, Evans, sought and had a private interview with appellant, and in the interview words passed between

appellant and deceased which were not heard by any one except appellant and deceased, though several customers saw them talking together privately; 6, that at the conclusion of the private interview deceased notified appellant that he would have to leave the service of the company on the 15th of that month, giving, among other things, as a reason for the discharge of appellant "that he, deceased, Evans, had it from the very best information that appellant, Davis, had been too intimate with a lady there in the house," meaning one of the lady clerks in the store; 7, that appellant, Davis, replied with this question, "Mr. Evans, what lady is that?" and that Evans replied to appellant, "It is enough for you to know that you quit on the 15th," and Evans walked away from appellant; 8, that appellant on that day, in order to accommodate a fellow-clerk, went to his dinner late, about 2 o'clock, and that as he returned from
168 dinner, between 2 and 3 o'clock in the afternoon, appellant purchased a pistol, placed it in his pocket, and went back to the store and tried to get a private interview with the deceased, Evans, in order to ascertain positively what lady had been referred to in the slander which had been reported to Mr. Evans, and to find out, if possible, the name of the slanderer; 9, that while he was walking up through the store, waiting for Mr. Evans to finish some business with a customer, in order to have a private talk with him as to the name of the slanderer and of the lady slandered, appellant caught hold of a piece of goods which the witness Terry King was handling and gave it a jerk, and then kicked over a stool which was in front of witness King, all of which offensive conduct toward Mr. King showed that appellant suspected Mr. King of the slander, and not the deceased, Evans; 10, that, feeling offended at appellant's conduct, Terry King spoke to him and asked him "what was the matter with him," to which appellant replied, as testified to by Mr. King: "Some one has been telling a lot of damned lies on me to Mr. Evans, and I am going to raise hell with him before six o'clock," and, as testified by appellant, Davis, his reply to King was in these words: "There is some one in this house been slandering me, and I will give him the mischief if I find out who it is," either one of which answers show that appellant did not know who it was that had uttered the vile slander against him and the lady in question to Mr. Evans, appellant not mentioning at that time the name of the lady in question, because he was not sure which one of the three ladies was referred to in the slander, as that was what he was trying to find out from Mr. Evans; 11, that appellant at last found an opportunity for a private interview with Mr. Evans, and then asked him this question: "Mr. Evans, I think I have a right to know what lady you have reference to;" to which Evans replied: "Davis, you know well enough who I have reference to, and Mrs. —— (giving name) and Miss —— (giving name) are no better;" to which appellant, Davis, replied: "Mr. Evans, if you make that accusation you are a liar;" and that Evans replied: "You are a God d-mned liar," and at the same time sprang up out of his chair, advanced toward appellant, and threw his hand down to one side as though to draw a pistol, and that appellant immediately com-

menced shooting the deceased. That is the case, as made by the evidence for the defense, aided and corroborated by the State witnesses Terry King and Mr. Eckert, and it was the theory of the defense. This state of facts clearly demanded a charge, upon the law, both of murder in the second degree and manslaugh-
169 ter.

We quote the following from the decisions of the court of appeals and the supreme court of Texas as to murder in the second degree: "If the act of killing results from a mere sudden, rash, and immediate design, springing from an inconsiderate impulse, passion, or excitement, however unjustifiable and unwarranted it may be, the act cannot be murder in the first degree, for in such case the sedate, deliberate mind is wanting, and without it there can be no express malice; and when the design has its first inception and origin in an inflamed and excited mind, incapable of such sedate, deliberate action as is compatible with express malice, and such design is carried into effect before there has been cooling time for passion or for the excitement to abate and the mental equilibrium to be restored, the killing, under such circumstances, no matter how such passion or excitement may have been induced or originated, cannot be murder in the first degree." Farrer *v.* The State, 42 Tex., 265; Ake *v.* The State, 30 Tex., 466; Atkinson *v.* The State, 20 Tex., 522; Duebbe *v.* The State, 1 Court of Appeals, 159. Again we quote: "The difference in the degrees of murder does not result from the length of time taken to form the design or the speed with which it is executed, but upon the condition of the mind performing such design." Duebbe *v.* The State, 1 Appeals, 160; Halbert *v.* The State, 3 Appeals, 657; Jordan *v.* The State, 10 Tex., 479; Farrer *v.* The State, 42 Tex., 265; Atkinson *v.* The State, 20 Tex., 522. Then, in the name of the law, as enunciated in the able decisions of our court of appeals and supreme court in the above-cited cases, we do most earnestly protest that the district judge committed an error of law against appellant in failing to charge the jury upon the law of murder in the second degree, for what could have been more calculated to produce in the brain of appellant "an inflamed and excited mind, incapable of such deliberate action as is compatible with express malice, causing the act to be carried into immediate effect before there had been cooling time for passion or for the excitement to abate and the mental equilibrium to be restored," than was the vile slander uttered against appellant and his affianced wife in direct terms at the very moment of the killing and while deceased was calling appellant "a God damned liar," and apparently making an assault upon appellant, the record showing that appellant did not until that moment know positively who the author of the slander was, nor that the lady whose character was traduced was the one who, above all others, he should honor and protect against even the
170 semblance of a slander? Therefore if the testimony of Terry King, G. L. Harris, and appellant Davis, above condensed, was true said evidence demanded a charge on murder in the second degree, and the judge could not decide said testimony to be false, for that is a question to be decided by the jury alone. The counsel for

the private prosecutors contend that such a charge could have done the defendant no good. That is very probable. We doubt whether any charge would have done defendant any good under the exciting circumstances which existed during the night session in which the charge was delivered to the jury; but this will not excuse the learned judge from performing the duties plainly required of him by the law. The supreme court and court of appeals have laid down the rule on this question in the following language, quoted from the decisions: "The rule is that a failure to define murder in the second degree in a case where the jury upon the evidence might have found the defendant guilty of the less offense will be cause for reversal, whether the instructions were asked or not." Saunders *v.* The State, 41 Tex., 306; Conner *v.* The State, 23 App., 386. "The correct rule is that to relieve the trial judge of the duty of charging upon the lower degrees of culpable homicide the evidence must establish the highest degree beyond reasonable doubt, for if there be reasonable doubt it must be solved by the jury and not by the court." Benevides *v.* The State, 14 App., 378; Murray *v.* The State, 1 App., 417. "It is error to charge the jury that they must either convict of murder in the first degree or acquit if by any possible legitimate construction of the evidence the jury might have found the defendant guilty of murder in the second degree." Edmundson *v.* The State, 41 Tex., 496; Conner *v.* The State, 23 App., 385; Blocker *v.* The State, on rehearing, 27 App., 40. The supreme court and court of appeals have also established the following rule: "If antecedent malice be shown, but a fresh provocation intervene between the preconceived malice and the act of killing, it will not be presumed that the killing was upon the antecedent malice." McCoy *v.* The State, 25 Tex., 44 (bottom page); Murray *v.* The State, 1 App., 379; Primus *v.* The State, 2 App., 379 (bottom); 2 Starkey, 712; Commonwealth *v.* Jones, 1 Leigh, 612. I will also quote the following language, used by Justice Willson in deciding a recent motion for rehearing in the court of appeals: "Trial judges should be exceedingly cautious in declining to charge on murder in the second degree. Instances are comparatively rare in which such a charge may be properly dispensed with. It is only where there is *no* evidence (italics by Judge Willson) 171 tending to present that issue that such a charge may be safely omitted." Blocker *v.* The State, on motion for rehearing, last clause of opinion, 27 App., 43. The Blocker case had been affirmed, but the court of appeals, in the above opinion, set aside their judgment of affirmance, granted the rehearing, and reversed the case. In appellant's case the judge charged the jury that if defendant provoked the contest with intention of killing Evans or of doing him seriously bodily injury, his plea of self-defense would avail him nothing. That is correct; but, as the facts were susceptible of two constructions, the judge should have charged further upon the converse of such proposition, for in a similar case in the court of appeals we find the following decision as to murder in the second degree as to the intent in provoking the contest, to wit: "The trial court erred in omitting to instruct the jury that if defendant provoked the contest with deceased, but not with the intention of killing or doing

serious bodily injury, that his plea of self-defense would be available to the extent of reducing the offense to a lower degree of homicide." Cahn *v.* The State, 27 Appeals, 738 citing White *v.* The State, 23 Appeals, 154; Roach *v.* The State, 21 Appeals, 249; Thurston *v.* The State, 21 Appeals, 245. Counsel for private prosecutors argued that we could not complain of the trial court not charging on murder in the second degree, because we did not ask for such charge in the court below. We will answer the gentleman by quoting the following condensed decisions stated in section 2338 of Willson's Code of Criminal Procedure and the cases cited therein: "In a felony case it is the imperative duty of the court, without being requested to do so, to give in charge to the jury all the law applicable to the case. This requirement relates to every phase or theory of the case fairly presented by the evidence. A defendant is entitled to have a distinct affirmative presentation to the jury by the court of the issues which arise upon the evidence, to the end that the jury shall not ignore his defenses, but may be guided to the proper verdict if they find his evidence true, and however improbable his evidence may seem to the trial judge it is the defendant's right to have its truth or falsity determined by the jury without being forestalled by the charge of the court. Every theory of the case presented by the evidence, whether strongly or weakly supported thereby, demands instructions to the jury directly and pertinently applied thereto, and this rule applies to every theory within the scope of the indictment which the evidence tends to establish, whether favorable to the State
172 or to the defendant." White *v.* The State, 18 App., 57; Burkhart *v.* The State, 18 App., 599; Irvine *v.* The State, 20 App., 12; Jackson *v.* The State, 15 App., 84. The law is well settled that in all felony trials the judge shall give in his charge the law and all the law applicable to the case as made by the evidence without any regard to the judge's opinion as to the truth of the evidence, for that is the business of the jury and not of the judge, and this is the rule, although the defendant does not ask it and does not except to the charge as given. It is the duty of the judge to attend to that part of the trial while the jury takes care of the evidence. Marshall *v.* The State, 40 Tex., 200; Ake *v.* The State, 30 Tex., 466; Pefferling *v.* The State, 40 Tex., 486; Curry *v.* The State, 4 App., 574.

Twentieth Assignment.

The testimony of the witnesses Terry King, J. W. Davis, and G. L. Harris raised the issue of manslaughter and demanded a charge from the court upon the law of manslaughter, and the omission of the court to so charge the jury is assigned as fundamental error. Section 20 of second amended motion for new trial, Trans., p. 103.

Argument.

The argument under the preceding assignment of error as to the necessity of a charge of murder in the second degree applies with equal force to the above assignment as to a charge on manslaughter,

and we will now briefly examine the law as to the last-named offense. The Penal Code defines manslaughter as follows: "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law." Penal Code, art. 593. "The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection." Penal Code, art. 594, sec. 3. "By the expression adequate cause is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection." (Penal Code, art. 595.) The Penal Code, art. 597, gives several examples of what acts constitutes adequate cause, but the courts have decided that "there are other adequate causes than those stated in art. 597, and that said article is simply explanatory and not restrictive, and that the question as to whether or not adequate cause existed is one of fact for the jury to determine." Brown *v.* The State, 38 Tex., 482; Johnson *v.* The State, 43 Tex., 612; West *v.* The State, 2 App., 460, last clause of opinion; Guffee *v.* The State, 8 App., 187;
173 Johnson *v.* The State, 22 App., 206. We also quote the following condensed decisions from section 1018, under art. 602, Willson's Penal Code: "Any condition or circumstance which is capable of creating and does create sudden passion, such as anger, rage, sudden resentment, or terror, rendering the mind incapable of cool reflection, is adequate cause. Where there are several causes to arouse passion, while one of them might not constitute adequate cause, yet all the causes combined might be sufficient to do so; and this is a question to be decided by the jury under appropriate instructions to be given by the court." Waddlington *vs.* The State, 19 App., 266; Neyland *v.* The State, 13 App., 536; Williams *v.* The State, 15 App., 617. The above enunciates the law as it is, and it is the law, and by authority of this law we submit that appellant was entitled in this case to a charge upon manslaughter, and that the omission to give such charge is fundamental error.

Twenty-first Assignment.

The action of the court, on the 28th of October, overruling defendant's motion to postpone hearing of the motion for new trial for one week and in allowing defendant's counsel only one day to travel twenty miles and return to procure the expected affidavits as to the juror Wilson, as set out in defendant's application for postponement of said motion, was unreasonable, unjust, and prejudicial, as the present term of the district court of Tarrant county does not expire till the last day of the year 1889, and the record shows no reason for undue haste in disposing of the motion for new trial and is here assigned as error. Motion to postpone, Tr., p. 149; bill of exception No. 11, Tr., p. 76.

Argument.

We submit the above assignment as illustrative of the great haste and public excitement attending this case in the court below. Appellant's sworn application for postponement of his motion for new trial shows that he only learned on that day the facts concerning the deception perpetrated by the juror Wilson by which he got on the jury which tried appellant, and as the district court will remain in session all the balance of the present year, giving ample time to pass on said motion, and as the appellant had been condemned to death, his counsel should have been allowed ample time to go twenty miles into the country and make full investigation of the matter in controversy and to prepare and obtain the proper affidavits concerning the fraud practiced by said juror, as the courts ought to aid in ferreting out and punishing all wrong,
174 especially as it involves the life of a defendant before the court. We believe the whole record will show that appellant has not had an impartial trial.

Twenty-second Assignment.

The charge of the court failed to define the term "malice aforethought" as used in the indictment and in the charge of the court, and fails to charge the jury that malice must have existed in the mind of the defendant for any time or particle of time prior to the act of killing, and this omission in the charge is assigned as error.

Argument.

Here is a fundamental error. The court below gave in his charge the following as a definition of simple malice: "Malice is that condition of the mind in which a person intentionally does a wrongful act toward another with intent to injure him, and is evidenced by such acts as show a heart regardless of social duty and fatally bent on mischief." This is not the legal definition of malice, but is incorrect and misleading. In Hayes *v.* The State, 14 Appeals, 331, a charge was given in almost the exact language of the above charge, and the court of appeals held it to be error and reversed the case, holding that "malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief," and that other ingredients may be essential in part as evidence of, but they are not and cannot be said to be, malice aforethought. In appellant's case the charge simply states that "malice is that state of the mind in which a person intentionally does a wrongful act toward another with intent to injure him," and then says that malice "is evidenced by such acts as show a heart regardless of social duty and fatally bent on mischief." In the Hayes case, above, Judge White says "that the doing of an unlawful act toward another with intent to injure him, though arbitrarily done, would be manslaughter if it was the result of sudden passion and upon adequate cause should the act result in death." The correct definition of malice is laid

down in Willson's Criminal Forms as follows: "Malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts done or words spoken," and this definition is followed by Judge White in the Hayes case, above. We find also in Willson's Criminal Forms, 709, the following as another definition of malice: "Malice means the intentional doing of a wrongful act toward another without legal justification or excuse," while the judge in appellant's case leaves out the qualifying clause "without legal justification or excuse," and leaves the charge subject to the objection stated by Judge White in the Hayes case, to wit, that simply the wrongful act of killing might be manslaughter and not murder. The charge in appellant's case nowhere tells the jury that the malice must have existed prior to the act of killing, and therefore does not define to the jury "malice aforethought." This is fundamental error.

Twenty-third Assignment.

The charge of the court fails to define to the jury the term "express malice," but simply tells the jury that "express malice is when one with a sedate and deliberate mind and formed design kills another," without drawing any distinction between express and implied malice, and the omission and charge are both assigned as error.

Argument.

The part of the above assignment in quotation marks is the court's charge on express malice, and no more defines express malice than it does implied malice. There is only one difference between express malice and implied malice, and that is this: Express malice has to be proved as a matter of fact, like any other fact in the case, while implied malice is inferred simply from the act of killing in the absence of any fact tending to show express malice on the one hand or any justification, excuse, or mitigation on the other. In other words, express malice appears from the proof of facts indicating antecedent malice, and implied malice appears from the absence of any facts indicating antecedent malice except the act of killing. Therefore all the authorities from Sir William Blackstone to the present time define express malice to be as laid down in Willson's Criminal Forms, 710, as follows: "Express malice is where one with a sedate and deliberate mind and formed design unlawfully kills another, which formed design is evidenced by external circumstances discovering the inward intent, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him bodily harm, or any other circumstances showing such sedate and deliberate mind and formed design unlawfully to kill or to inflict serious bodily injury which might probably end in the death of the person upon whom the same was inflicted." The above definition is shown to be the correct one by reference to the following authorities, from which it is taken by Judge Willson, and is the exact definition stated in 4 Blackstone's Com., 198: McCoy *v.* The State,

25 Tex., 35; Farrar *v.* The State, 42 Tex., 265; Singleton
176 *v.* The State, 1 Appeals, 507; Duebbe *v.* The State, 1 Appeals, 165; which last case cited dissects the above charge by analysis and shows it to be the only real definition of express malice. There can be no murder without malice aforethought, antecedent malice, and there can be no antecedent malice, or malice aforethought, without a deliberate mind and formed design; therefore an unlawful killing with a deliberate mind and formed design may be upon either express malice or implied malice, and may be murder either in the first or second degree, or, under mitigating circumstances, might be manslaughter. The charge of the court in appellant's case, quoted in the foregoing assignment of error, has been held to be incorrect by the court of appeals in the following recent cases: Crook *v.* The State, 27 Appeals, 242; Pickens *v.* The State, 13 Appeals, 351; Cahn *v.* The State, 27 Appeals, 738; Gonzales *v.* The State, Tyler term, Nov. 2, 1889. It is true that in the last-cited cases the word "unlawful" before the word kill was left out, but the simple fact that the killing was unlawful would not make it murder in the first degree, for it might be murder in the second degree, or manslaughter. This charge, as stated in the last case cited, is fundamentally erroneous and should reverse the judgment.

Twenty-fourth Assignment.

The charge of the court fails to define implied malice, and thus fails to show the difference between express and implied malice in order to enable the jury to determine whether the killing was upon express malice or not, and yet tells the jury to determine whether or not the killing was upon express malice; and this omission of the court is assigned as error.

Argument.

The facts of this case demanding a charge on murder in the second degree, it was the duty of the court in its charge to define to the jury implied malice as well as express malice, and the argument under the preceding assignment applies also to that set out above; and the failure to give such charge is fundamental error.

Conclusion.

As the following assignments of error refer to the Record by pages and sections, they need no argument, but we refer them to the court with the errors therein shown, to wit: The 25th, 26, 27, 28, 29, 30, 31, 32, 33, and 34th assignments on consecutive pages of the Record. For the errors complained of in the foregoing thirty-six assignments
177 of error, we present to the court that the judgment should be reversed, and that the venue of this cause should be changed to another county.

Respectfully submitted.

GEORGE CLARK,
S. C. UPSHAW,
W. M. PERRILL,
BYRON JOHNSON,
Of Counsel for Appellant.

Endorsements: No. 3329, 2787. Motion No. 7. 1st assignment, Tyler term, court of appeals, 1889. J. W. Davis *vs.* The State. Mo. 924. Appellant's original motion for rehearing. Filed Dec. 20th, 1889. E. P. Smith, cl-rk. Filed in court of appeals Apr. 24, 1890, at Austin, Texas. P. Walton, clerk.

I hereby certify that the foregoing, from the middle of page 139 to the last line above this certificate, contains a correct copy of appellant's original motion for rehearing, filed in the court of appeals of Texas in the cause of J. W. Davis *v.* The State of Texas, as from the records of my office is manifest.

Given under my hand and seal of office, at Tyler, Jan'y 2, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

State's Reply to Motion for Rehearing.

In Court of Appeals.

J. W. DAVIS *vs.* THE STATE OF TEXAS. } Replication to Appellant's Motion for Rehearing.

The main point relied upon in appellant's brief for a rehearing is the alleged error of the trial court in failing to charge the law of murder in the second degree. This point is pressed with great force and earnestness by the distinguished counsel who has prepared the brief. The vital importance of this case, not only to the appellant, but also to the best interests of society, requires that the issues presented should be met in a spirit of perfect fairness and candor. It is certainly a fearful thing to deprive a human being of his life under any circumstances, and it should never be done except upon the clearest evidence and after a due compliance with all the requirements of the law. If it be true that appellant has been deprived of any substantial right or that any issue favorable to him, fairly and legitimately arising from the evidence, was withdrawn from the jury by the failure of the trial court to submit suitable instructions with reference to it, then, upon every principle of reason, justice, and law, a rehearing should be granted him; but, on the other hand, if it be true that this record shows that
178 appellant, beyond all question, is guilty of a most deliberate, premeditated, cold-blooded, cowardly, and cruel assassination, and if the record also shows that upon the trial of his case he was given the full benefit of every legal right guaranteed to him by the law, and that the jury was appropriately instructed upon every legitimate issue growing out of the testimony, then it is the imperative duty of this court of last resort, painful though it be, to pronounce the judgment of the law in order that the peace and well-being of society may be maintained, that justice may be done, and that the law-abiding people of our State may be protected in their

lives. Our Code of Criminal Procedure expressly provides that in criminal cases "the judge shall deliver to the jury a written charge in which he shall distinctly set forth the law applicable to the case." When the judge has done this so far as the charge is concerned he has performed his full duty. In order that an issue may be raised calling for an instruction upon any question of law in behalf of the defendant, there must be a failure of evidence on the part of the State upon some material point or there must be some evidence on the part either of the State or the defendant from which the jury may fairly, reasonably, legitimately, logically arrive at a conclusion of fact favorable to him. The mere possibility of their reaching a conclusion in his favor is not enough. This possibility must be attended with some show of reason; otherwise it would be illogical to say that "the law applicable to the case" means "the law applicable to every legitimate issue arising from the evidence." Mere possibility of error cannot be made the ground of reversing the solemn judgments of courts of law without defeating the very objects for the accomplishment of which they were constituted. Reason and experience alike teach us that it is always possible that we may be mistaken about any matter of fact or of judgment. Mathematical certainty is not attainable in the administration of law. To say that a new trial should be granted in any case upon a mere possibility of error would be a libel upon reason, an outrage upon justice, and a prostitution of law. It would be to establish a rule which would make it absolutely safe for assassins to steal the lives of unoffending citizens and which would merit and receive the everlasting gratitude and applause of thieves. The point now under discussion involves two distinct questions of fact, both of which will not reasonably admit of any other than negative replies:

1. Is there such a want of evidence on the part of the State
179 upon the point of express malice as would make implied malice not a possible issue, but a "legitimate issue arising from the evidence"?

2. Is there in the record any evidence, contradicted or uncontradicted, either from the State or the defense, which makes implied malice not a possible issue, but a "legitimate issue arising from the evidence"? The first question will not admit of any other than a negative answer, even counsel for appellant have never denied. The contention is over the second question. Before entering into a discussion of the merits of this question there are two significant facts to which I desire to call special attention:

1. Upon the trial of this cause in the lower court appellant's counsel, although learned in the law and zealous to a degree which challenges the admiration of all who know anything of this case, recognized the fact that there was no evidence raising the issue of murder in the second degree. This cannot be questioned without reflecting upon their learning, upon the one hand, or their fidelity to their client, upon the other. The record is full of bills of exceptions to all other points, but it does not contain an exception to the action of the court in failing to charge upon the law of murder in the second degree, neither does it contain any request for instructions upon this

point. Can it be said that they were not aware of Blocker's, Cunningham's, and Elam's cases? If they regarded implied malice as a "legitimate issue arising from the evidence," when the gallows was staring their client in the face, why did they not make this point then? Why did they, as a last and desperate resort, raise this question for the first time after conviction? This is not a case in which the defense was in inexperienced hands. The names of his counsel are to be found in almost every volume of the reports of this court. But it may be said that his counsel, recognizing the fact that juries are often deterred from convicting when the punishment is extreme, thought that their chances of an acquittal or a hung jury would be better where the issue was murder in the first degree or not guilty, in order to get the benefit of this advantage in the trial, did not raise the question of murder in the second degree, fearing a conviction in that degree, when otherwise an acquittal might be obtained for the higher degree. If this explanation be offered, then it is clear that the point was not made because it was supposed to be to his advantage not to make it. Then he waived the question in order to get the benefit of the increased chance of an acquittal or a hung jury.

180 Place any construction upon the failure of appellant to except or ask special instructions on the law of murder in the second degree, and, while it is true that under our law he is now estopped from raising that question, yet such conduct is worthy of consideration in determining this motion.

2. In the brief for a rehearing counsel does not pretend to make any argument upon the evidence showing wherein implied malice is a "legimate issue arising from the evidence." They substitute assertion for argument, and assume the very point in controversy. In their zeal for their client, doubtless recognizing the crushing force of the evidence upon this point, they abandon the testimony and seize upon the statements made in the opinion of this court, affirming the judgment of the lower court, to the effect that there is some evidence in the record tending to present this degree of homicide; that it is possible that the jury may have believed appellant's statements; that it is possible that the jury may not have believed that appellant provoked the difficulty for the purpose of a pretext to slay the deceased, and that it is possible that murder in the second degree would have been the verdict of the jury if the court had charged on murder in the second degree. This is the rock upon which they place their motion. They have overlooked the fact that this court nowhere in its opinion states that any of these propositions are "legitimate issues arising from the evidence." To read the brief of counsel for appellant any person uninformed in criminal law would come to the conclusion that this court had stultified itself by deciding directly contrary to its own admissions of record. Counsel have overlooked the fact that while the court, for the sake of argument only, admitted certain things to be possible, it also said in express terms that "there is not only no self-defense in this case, but there is no murder in the second degree; and in view of the facts, the cogency of the facts, the overwhelming conclusiveness of the facts in support of murder in the first degree, if a charge had

been submitted permitting the jury to find a less degree, no juror with the least degree of intelligence, unless corrupt, would have entertained for a moment the suggestion of any theory less than murder of the first degree." How counsel for appellant can base their motion for a rehearing solely upon the admissions of this court that certain things were possible in view of the clear and emphatic statement of the court
181 that "no juror with the least degree of intelligence, unless corrupt, would have" found them to be "legitimate issues arising upon the evidence" is beyond the power of my feeble comprehension. I can only understand it upon the ground of the desperation of their case; upon the ground that they recognize the fact that the testimony contained in this record will not stand a discussion. There is certainly no want of ability and learning upon the side of appellant. Besides the attorneys who represented him upon the trial in the court below and upon the submission in this court, they have strengthened their ranks by calling to their aid one of the unquestioned leaders of the Texas bar. His name is a guarantee that appellant's case is now presented in the strongest possible light. It is a significant fact that this "Goliah" of the law avoids a discussion of the evidence in his brief and bases his argument upon admitted possibilities. It is also an equally significant fact that this distinguished gentleman cites no authorities showing that a case should be reversed upon mere possibilities.

But to address myself to an argument upon the facts. We can blot out from the record the testimony of McLaury, Hollingsworth, and Elliston and the physical facts attending the homicide, all of which demonstrate to an absolute certainty the utter falsity of appellant's evidence. We can admit the absolute truthfulness of every word that appellant and his witnesses testified to and still in the light of the uncontradicted and therefore admitted facts of this case there is no possible rational escape from the conclusion that appellant is guilty of a deliberate assassination. In this argument I will not use a single fact that is in anywise inconsistent with appellant's evidence. I will accept his testimony, for the sake of argument, as true, and then view it in the light of the facts which he does not deny or in any manner impeach. It is now a question of the credibility of the witnesses. Let all contradictions be eliminated and how does the case stand?

1. The record shows an undenied former grudge of one month's standing.

2. The record shows a conversation about 9.30 o'clock on the morning of the homicide between deceased and appellant, at which appellant claims that he took offense.

3. The record shows that about 3 or 3.30 o'clock appellant, after thinking about the matters of difference which he alleges arose in the morning, left his place of business and went coolly and deliberately and purchased a pistol and gave a false account of what
182 he wanted the pistol for. This is not denied.

4. The record shows that after purchasing the pistol and returning to the store appellant immediately began to hunt for the deceased. This is not denied.

5. The record shows that the appellant waylaid the deceased and for half an hour watched for a chance to catch deceased by himself. This is not denied.

6. The record shows that during all this time, from purchase of the pistol until after the consummation of the deadly purpose for which it was procured, appellant was perfectly cool and free from excitement, and that he acted with the utmost caution and deliberation. This is not denied. All of these facts are testified to by credible witnesses. Appellant heard their evidence. He was afterwards upon the witness stand. He had an opportunity to deny their statements or to explain his motives and conduct. He did neither. When every principle of self-preservation called upon him to speak he was silent. Thereby he has admitted the truthfulness of these statements. But let the witnesses speak for themselves.

Admitted Fact No. 1.

On page 9, line 8, of the Transcript, will be found the testimony of Edward Mason, as follows: "The defendant never expressed himself to me otherwise than as feeling all right with B. C. Evans until about a month before the killing of B. C. Evans. He and I were talking on a Sunday in regard to him taking a situation with me, travelling with a New York shirt factory, and he spoke to me several times about the treatment Evans had shown him, keeping somebody else over him and cutting his salary, etc. He said he had treated him badly. He had put somebody else over him, an old man, who had worked hard four or five years, and paid him a better salary. * * * I guess he spoke to me about this once or twice. He did not seem to be very friendly toward him about it; feeling like a man that thought he had been treated badly." On page 10, line 8, in answer to appellant's question, the witness further said: "Well, I believe he expressed some language that I would not care to express—that he, Evans, had treated him, Davis, like a dam- rascal." There are two observations which are pertinent to a proper appreciation of the force of this testimony. If the court will turn to the transcript and read the entire testimony of this witness it will be seen that he was a friendly witness toward the appellant and did all in his power to break the force of what he was compelled to tell. The other is that appellant
183 heard this evidence and did not deny or explain it, thereby admitting that it was stated in its most favorable light for him. Neither is there the least inconsistency between this evidence and the testimony of appellant. What is the "legitimate issue arising from" this "evidence"? By appellant's own statements to Mason the following facts are admitted: 1, appellant had been in the employment of the deceased for four or five years; 2, deceased had recently employed a new man and placed him over appellant; 3, deceased had reduced the salary of appellant; 4, appellant had taken offense at this; he was not feeling friendly towards deceased and had denounced him as a "dam- rascal." But it may be contended that defendant did not mean to apply the term rascal to

deceased, but meant that deceased had treated him as though he, appellant, were a "dam- rascal." This is an unnatural construction of the language, but accept it and it will only intensify the ill will which appellant is proven to have entertained against deceased. Few things will excite greater resentment on the part of any person claiming to be respectable than to be treated as though he were a "dam- rascal." It is therefore an unavoidable "legitimate" conclusion that for more than a month before the homicide the appellant entertained a "grudge" against deceased; that his mind was inflamed toward deceased with ill will and hatred, evidenced by the use of such violent language as "dam- rascal." Here we have the first element of express malice undisputed; and, according to appellant's own statement, this grudge was not only without just ground for support, but it clearly grows out of that communistic spirit which now constitutes the chief disturbing element in the social system and which is directly at war with the spirit of our free institutions, viz., the employé claiming the right to be aggrieved because his employer exercises the unquestionable right of employing some other man and of giving him a more prominent and confidential position, and denouncing his employer as a "dam- rascal" because that employer did not place as high an estimate upon his services as he did himself. Thus from appellant's own mouth we have the origin of the feeling of hostility which he bore toward deceased for about one month and which grew and took form until the afternoon of the 6th of July, 1889, when it culminated into the deadly purpose of the assassin, which was executed in such a cruel, cowardly, and brutal manner as to send a thrill of horror through the heart of every one who reads this bloody record.

184 *Admitted Fact No.* 2.

On page 35, line 18, Transcript, will be found appellant's evidence, as follows: "I suppose it was between 9 and 10 o'clock Mr. Evans came down in the store and commenced talking to me; asked me how the stock was and a good many questions, and then he says, 'Mr. Davis, I don't think I will need your services any longer than the 15th,' and he said, 'This is not all; I have it from the very best information that you have been too intimate with a lady here in the house.' I says, 'Mr. Evans, what lady is that?' and he says, 'That is enough for you to know, that you quit on the 15th,' and walked off." This is perfectly consistent with Mason's evidence. It is only what might have been expected. The employer, for reasons satisfactory to himself and which no one else had a right to control, had previously given preference to some one else in the matter of employment and put this new man over appellant in the affairs of the business. Not finding appellant's services as valuable as he had once regarded them, the employer had reduced appellant's salary. Appellant takes offense at this and talks of the employer as a "dam- rascal." Being in this dissatisfied frame of mind, it follows as a matter of course that his services became less valuable to his employer, and his discharge follows as a natural conse-

quence. As to this part of appellant's testimony, its truthfulness cannot be questioned. As to the statement with reference to the lady, the State repudiates it in whole and in part, but for the purposes of this argument will not attempt to show its falsity, which the record proves overwhelmingly, and will allow it to stand as the truth. What is the "legitimate" deduction to be drawn from this testimony? The mind of the appellant for a month or more had been inflamed against the deceased for reducing his salary and putting a new man over him. He has been complaining to his friends about it and saying that the deceased had treated him like a "dam- rascal." From his standpoint fresh provocation had been given; another injury has been inflicted upon —. A new man has been employed and put over him. His salary has been reduced. Now he is discharged. If the reduction of his salary and putting a new man over him was such a serious offense as to excite his anger and call forth the charge of having acted the "dam- rascal" with him, how much greater must have been his resentment at his discharge? Grant that the language attributed to deceased with reference to the lady had been used, from the standpoint of the appellant it would have added insult to injury and would have
185 increased his resentment towards deceased. It strengthened the State's case on the point of ill will. It makes more certain the evidence on the subject of express malice. So, then, there is no escape from the conclusion, upon appellant's own showing, that on the morning of the homicide he did bear a grudge against deceased.

Admitted Fact No. 3.

On page 12, Transcript, will be found the evidence of Dan. Prichard, which is as follows: "I remember the day on which B. C. Evans is said to have been killed. I am acquainted with the defendant, J. W. Davis. I saw him on that day, about half an hour before I heard of the killing. Davis bought a pistol from me on that occasion. I loaded it for him. He told me what he wanted with the pistol. He says, 'There is a bitch prowling around my house. There is about a dozen dogs out there and I cannot sleep good, and I want to pepper them some;' and we selected this pistol, and he said he would take it and for me to load it, and I loaded it. I loaded five barrels. * * * He did not call for any more cartridges than what were in the pistol. * * * I don't think he was excited when he was in there." Appellant was upon the witness stand after hearing this testimony, and yet he did not attempt to deny or explain it. There are several observations that are necessary to be considered in this connection. This evidence, taken by itself, might or might not amount to much, but when viewed in connection with the admitted facts of this case it becomes of fearful significance and indelibly affixes the brand of Cain upon appellant's brow: 1. The reason given by appellant for the purchase of the pistol was evidently only a cover for some other purpose. If he had wanted it to take home with him to shoot dogs he would have purchased more

than the cartridges with which five of the six cylinders of the pistol were loaded. He could not have shot a bitch and twelve dogs with five cartridges. This would have been as difficult an undertaking as was his subsequent futile attempt to screen his guilty head at the expense of the reputation of the woman whom he professes to love. If he had wanted to pepper dogs who disturbed his sleep at night a shotgun would have been much more effective. If he had wanted to shoot dogs with a pistol, why did he not purchase it as he went to dinner and take it home with him then, or why did he not wait until his work for the day was over and purchase and take it home with him that evening? What sudden emergency impelled him after returning from his dinner to leave the store about an hour before the killing of deceased and purchase
186 this pistol? How does it happen that this particular bitch and twelve dogs had never disturbed his slumber until after he is discharged by deceased? Why does he begin to hunt for deceased as soon as the pistol is purchased and never cease that hunt for a moment until his hands are red and dripping with human gore and innocent blood? That appellant purchased the pistol to shoot dogs may be possible, but I respectfully submit that it is not a "legitimate issue arising from the evidence." When on the witness stand appellant did not deny that when he stated to Prichard that he wanted to shoot dogs he referred to and meant no other person save and except B. C. Evans, and him only. He ignored this evidence entirely, and thereby not only admitted the truthfulness of Pritchard's evidence, but also his inability to explain it. If it had been susceptible of any other explanation he had the opportunity to offer it. Having failed to speak then, it is too late for the plausible theories of counsel to prevail now. Can any sane man, in view of what had preceded and what immediately followed, for one single moment doubt but that appellant, animated by ill will and a "former grudge" against deceased, coolly and deliberately purchased that pistol for the purpose of taking the life of B. C. Evans? If so, upon what evidence in this record can that doubt find a reasonable basis? I challenge and defy the distinguished counsel for appellant to cite one single word of testimony that will bear such a construction without violence to the plainest dictates of reason and common sense.

Admitted Fact No. 4.

The admitted facts in this record not only show that the appellant was animated by ill will toward the deceased and that appellant purchased a pistol coolly and deliberately, but it is also an admitted fact in this record that immediately after purchasing this pistol appellant began to hunt for deceased; that appellant left his place of business to hunt for and waylay the deceased until he found a favorable opportunity to steal his life. The evidence of Dan. Pritchard, above quoted, shows that the pistol to "shoot dogs with" was purchased about thirty minutes before he, Pritchard, heard of the killing; or, in other words, that within thirty minutes after appellant had purchased the pistol Pritchard heard of the killing of deceased.

Conduct speaks louder than words. Let us see from the evidence, undisputed and thereby admitted, what the conduct of appellant was after that pistol had been purchased. On page 19, line 14, will be found the undisputed testimony of W. F. Rogers, which is as follows: "There is a piece of curtain covering the front opening between the clothing department and the carpet department. Shortly before the killing I saw Davis go there and look through. The curtain was in two pieces and came together in the center. He pulled one of them one side and looked in through. I saw him look through there twice that day. The last time was, I should say, probably thirty minutes before the killing. After he went away I went and looked through and saw Evans and Eckert in the office." On page 14, line 11, Transcript, will be found the evidence of A. L. Eckert, which is as follows: "I had been there some twenty minutes or half an hour. When I was there Davis passed through this building. He came through the west opening and passed through the front door. I had not been there but a little while when he first came in. He came again and walked up about there. I was standing against the safe. Evans was sitting and I was facing him talking to him, and Davis walked up and stopped. I saw Davis when he walked up. He stopped and I turned around and faced him. He was then making a motion like this, going in for a paper. I thought he wanted to show it to Mr. Evans. When I turned around Davis turned around and went back through the opening. Not a word was spoken." On page 17, line 19, will be found the testimony of Walter Wyatt, as follows: "I saw the defendant, J. W. Davis, a few moments before the killing of B. C. Evans. I was standing at the opening at the back part of the building, at a basket that goes up there. I saw the defendant, Davis. He passed me and went and looked in the carpet department. He went right through that archway; don't know how far he went. He came back immediately and went through into a little dressing-room we have over this side of the building, on the south side of the clothing department; could not say exactly how long he was in there—some three or four minutes. Then he came back right through the opening in the rear of the clothing and carpet departments. When he went in there I started to the front. I heard the shots when I had gone about two-thirds of the way to the front." Appellant heard all this evidence. He did not pretend to deny a single word of it. On the contrary, he, in express words, corroborated it. On page 36, line 9, will be found appellant's testimony, as follows: "I did not see Mr. Evans from about 9.30—somewhere along there—until after I got my dinner. I saw him in the afternoon, after dinner. I think the first time I saw him was behind the dress-goods counter, talking with some one—I forget who now—and I passed
188 on down; passed by the counter two or three times and walked in the carpet-room two or three times," etc. Let it be remembered that appellant testified that he was employed in the clothing department. This court has the diagram showing that the clothing department is twenty-three feet and a fraction wide by eighty-seven and a fraction feet long; that it — surrounded by brick

walls and only connects with the other departments by doors or archways. If appellant was not hunting for deceased why did he leave the clothing department, his place of business, and walk up and down before the counter when deceased was behind it talking to some one? If appellant desired to see deceased upon a peaceful mission why did he arm himself with a deadly pistol before seeking the interview? If appellant was not hunting for and waylaying deceased why was he peeping through that front archway, watching deceased as he sat talking to Eckert, unconscious of the storm then gathering and which so soon afterwards spent its fury upon his defenceless head? If appellant was not making it his business to hound deceased to his death why did he leave the clothing department and go three times into the carpet department where deceased was and where appellant had no business? On coming into the carpet department the second time and walking up to where deceased and Eckert were why did he stop, and why did he raise his hand to his pocket as though he was going for something, and why, when Eckert turned and faced him, did he drop his hand to his side and turn and walk off without saying a single word? In the light of preceding and subsequent facts he walked up there to kill deceased then. It was not a paper, as Eckert supposed, for which he raised his hand to his pocket. He raised his hand for the pistol which but a few moments before he had purchased from Pritchard to "shoot dogs with." When Eckert turned and faced him, for some reason his heart failed him. Doubtless because he feared that Eckert would catch his hand and stay his deadly purpose; so he bides his time. He picks an opportunity when no one would be there to interfere. He goes back into the clothing department and waits, like a tiger in its jungle, for Eckert to leave and give him an opportunity to pounce upon his unsuspecting prey. He becomes impatient. Wyatt sees him go and look into the carpet department through the back archway. He immediately returns and goes into the dressing-room and remains in there three or four minutes. He doubtless saw Eckert coming. Eckert swears that just before the shooting he left deceased
189 sitting in the chair, and went through the back archway and deposited some money at the office and started back when the shooting began. Then there is no escaping the conclusion that when Wyatt saw appellant look in at that back archway and then go immediately into the dressing-room and stay there three or four minutes, that when appellant looked in at that archway he saw Eckert coming, and that he got back into that dressing-room in order to hide himself until Eckert should pass by, and thus afford appellant the opportunity to catch deceased by himself, for which appellant had been planning and watching for half an hour. Eckert had thwarted his devilish purpose a few minutes before when he turned and faced him. He will not let Eckert see him now, so he hides until Eckert has passed by. These are the uncontradicted facts of this case. Can it be said that implied malice is a "legitimate issue arising from" this "evidence"?

Admitted Fact No. 5.

During all this time appellant was perfectly cool and collected. He acted with the utmost deliberation; there was no evidence of excitement; appellant did not do or say anything to indicate his purpose. Pritchard swears that appellant was not excited when the pistol was purchased. No witness for the State saw any evidence of excitement. The appellant himself does not claim that he was laboring under the least excitement. His conduct from beginning to end is confessedly the result of the caution, deliberation, and formed design. In this argument I have not presented a single fact denied by appellant or a single fact that is in anywise inconsistent with the entire truthfulness of his evidence. His statement of the facts attending the homicide do not in any sense either excuse or mitigate his act. Admit that the deceased was making an attack upon him; admit that the deceased was armed; admit that deceased fired a shot at him or stabbed him with a knife, and still appellant's case is one of cold-blooded, premeditated assassination. He swears that he approached deceased and began the altercation. His previous grudge and deliberate preparation; his hunting for deceased, armed with a deadly weapon; his waylaying deceased; his hiding in the dressing-room, all show beyond all reasonable doubt that he was animated by a fixed and deliberate intention to take the life of deceased upon the first opportunity. If, for this purpose, he began an altercation in order to get up a difficulty or to provoke an attack from deceased to obtain a pretext for slaying him, it matters not to what extremity he was reduced, he is still an assassin in the eye of reason and of the law. But it is claimed by counsel that appellant might have gone to deceased for the purpose of inquiring further about the charges which appellant claimed deceased had made against him in connection with the lady and without any purpose on his part to raise a difficulty with deceased and do him bodily harm. This is more than appellant claimed for himself when he was on the witness stand. He not only had the right to explain his conduct, but it was his duty to do so. He never once said that he went to deceased to have a peaceful explanation. He never once said that he did not intend to kill deceased when he entered the carpet department. He did not say what his purpose or business was in going into the carpet department. There is not a single word of evidence showing that he wanted a peaceable explanation. If he wanted a peaceable explanation, why did he purchase that pistol before starting out on his hunt for deceased? Why did he waylay deceased? Why did he hide in that dressing-room when he saw Eckert coming? Why did he shoot at deceased after deceased had fallen to rise no more, and after he had heard the despairing cry of that unarmed and unoffending man calling to him, "Oh, Mr. Davis, don't?" Why did he continue to fire at the back of his bleeding, defenseless, and dying victim, as poor B. C. Evans lay upon the floor, convulsed with the agonies of death and calling upon God with his expiring breath to

have mercy upon him? What possible danger was appellant in then? Appellant has never denied any of these terrible facts. No other witness has denied them for him. They are admitted facts in the case. Leaving out that great mass of facts testified to by the eye-witnesses to this assassination and the physical facts in the case, which cannot lie and which show conclusively the falsity of appellant's statements as to the circumstances of the killing, and taking none but the facts which he admits to be true and giving full credence to his own statements, there is but one legitimate conclusion warranted by the testimony in this case, and that conclusion is that appellant is guilty of murder in the first degree. If the facts hereinbefore cited be true, which is not denied, and if the conclusions herein deduced from those facts be correct, which I respectfully submit are the only "legitimate" conclusions growing out of these facts, then there is absolutely no murder in the second degree in this case, and under the repeated decisions of this court it is immaterial whether an exception was taken to the charge or special instructions were asked on the law of murder in the second degree. Not be-
191 ing a "legitimat- issue arising from the evidence in the case," it would have been a violation of both the letter and the spirit of the law for the court to have given such an instruction. The charge of the court upon the law of self-defence is full and clear. The jury are told that if appellant's theory of the case was correct they should acquit him, unless the evidence forther showed beyond a reasonable doubt that appellant had provoked the difficulty in order to get a pretext to slay the deceased, in which event he would be guilty of murder in the first degree, no matter to what extremity he may have been reduced in the conflict. The correctness of this instruction is not questioned. Under it the jury were required to acquit the appellant if they accepted his theory unless they further found that he provoked the difficulty "for the purpose and with the formed design and intent to take the life of his adversary." The omission to tell the jury that if he provoked the difficulty with a less criminal intent he might be guilty of murder in the second degree, or of manslaughter, was an omission in appellant's favor. Under the instruction as given, if the jury gave credence to appellant's statement, they were bound to acquit him altogether, unless they found that he provoked the difficulty with a certain clearly stated purpose. No less purpose would warrant a conviction. Under the instruction as given they would have been forced to give him his liberty unless they found, beyond a reasonable doubt, that his purpose in provoking the difficulty was a deadly one. This was giving appellant an opportunity for an acquittal upon grounds which would call for a conviction of murder in the second degree, or of manslaughter. Certainly he cannot have been injured — an instruction which thus opened up additional avenues of escape for him, especially when it is remembered that upon the trial of this cause his counsel acquiesced in and accepted the issue thus tendered them, and by means of which they were given a decided advantage and increased prospects of a hung jury or an acquittal. Appellant now stands in this attitude. Upon the trial he claimed self-defence. The court

gave him a clear instruction on the question of self-defence. The court then put one limitation upon that right. This limitation was put on in such form as to throw the heaviest possible burden of proof on the State. Appellant did not then object to the issue thus formed. Being convicted, he now says the court should have put at least one more limitation or restriction upon his chances of an acquittal, and that he ought to have a new trial because this was not done. A
192 more paradoxical position was never taken before a court of last resort than that now occupied by appellant's counsel. It does not arise from any want of learning or ability on their part. They have been forced to take it by the desperation of their cause. It is this or nothing. The fairness of appellant's trial and the justice of his condemnation is thus vindicated by the positions of the very counsel who are trying to screen his guilty head from the just mandates of the law. In effect their arguments amount to an admission of record of the hopelessness of their cause. In Bishop's case the supreme court, in laying down the rule which should govern trial courts in preparing their instructions, on page 402, uses the following language: "When the evidence tends sufficiently to the establishment of a defense or mitigation of the offense charged as to reasonably require a charge as applicable is a question of sound judgment to be exercised by the district judge in the first instance and afterwards by the supreme court on appeal. If its force is deemed to be very weak, trivial, light, and its application remote, the court is not required to give a charge upon it. If, on the other hand, it is so pertinent and forcible as that it might reasonably be supposed that the jury could be influenced by it in arriving at their verdict, the court should charge so as to furnish them with an appropriate rule of law upon the subject." But counsel for the appellant say that Bishop's case was reversed. This is true; but in what manner does that weaken, detract from, or alter the rule above laid down? This decision can be carefully studied from beginning to end, and not one word can be found in it which is in the least inconsistent with the rule cited. We are not concerned with the final disposition of Bishop's case. We are dealing with the rule of law which it establishes. But to consider the question of reversal. Bishop is indicted for the theft of a certain cow. His defense is purchase in good faith. On page 391, in discussing the evidence, the court says: "The defendant proved that she (the prosecuting witness) said she did not claim any cattle as hers not branded. This she denied. He also proved by George Adams, nephew of Mrs. Lizzie Hill (the prosecuting witness) and who attended to Mrs. Hill's cattle and lived with her, that he was present when Bishop bought this cow in a certain store in Corsicana from a man by the name of Keel, and that he went with them to a certain place—to the juncture of Post Oak and Elm creeks, where they found the cow on the same day." On pages 402 and 403 the court applies the rule hereinbefore stated as follows: "To apply
193 the rule here indicated * * * it is sufficient to say that there was evidence in the testimony of Mrs. Bishop and of George Adams which sufficiently tended to establish a defense to

require the court to have instructed the jury as to the import of the terms fraudulent taking, or to have informed them what facts would rebut the presumption of a fraudulent taking of the animal." So the court says, in express terms, that the case is reversed in conformity with the rule which I now invoke. That the reversal was proper cannot be questioned. No one saw appellant steal the cow. The only witness to the taking swore that appellant bought the cow in good faith. That the rule laid down is not correct counsel by argument does not attempt to demonstrate, but content themselves with the assertion that the case was reversed. The rule laid down in Elam's case, 16th Ct. App., 40, and 17 Ct. App., 96, by a full bench of this very court, without a dissenting opinion, but follows and amplifies Judge Roberts' opinion in the Bishop case. While it is true that some words can be culled out of the reports which appear to conflict with this line of decisions, yet upon an examination of the question at issue it will be found that the conflict is only apparent. Neither of the three cases relied upon by the State have ever been questioned before. The rule established by these cases is not only the law upon principle, but it is the necessary deduction of statutory provisions. Art. 685 of the Code of Criminal Procedure is as follows: "Whenever it appears by the record in any criminal action, upon appeal of the defendant, that any of the requirements of the eight preceding articles have been disregarded the judgment shall be reversed, provided the error is excepted to at the time of the trial." The first of the eight preceding articles referred to requires that "the judge shall deliver to the jury a written charge, in which he shall distinctly set forth the law applicable to the case." Two things must concur under these provisions to entitle an appellant to a reversal: 1st, the judge must have failed to "distinctly set forth the law applicable to the case;" 2nd, the appellant must have excepted to this error "at the time of the trial." This is the plain language of the law; it requires no explanation; it will not admit of misconstruction. But is there no other statutory ground for a new trial covering substantially the same field? Suppose appellant fails to except to the error "at the time of the trial," what are his rights? Sec. 2 of the art. 777 of the Code authorizes a new trial or reversal, "when the court has misdirected the jury as to the law or has committed any other material
194 error calculated to injure the rights of the defendant." Under the first clause of this section there must be a positive misdirection "as to the law." An omission to charge upon the law applicable to some issue raised by the evidence is not ground for a new trial unless it is of such a character as to become a "material error calculated to injure the rights of the defendant." If appellant had excepted to the action of the trial court in failing to charge murder in the second degree, then, if he could have shown that there was evidence in the record which would make this issue "a legitimate deduction which the jury might draw from the facts" (Johnson *v.* The State, 27 Tex., 766), he would be entitled to a new trial. In this brief an argument has been made from this stand point. It is most earnestly insisted that there is no such want of

evidence on the part of the State of express malice, nor is there any such testimony on the part of appellant, in view of the undenied and therefore admitted facts of this case, as make murder in the second degree a "legitimate deduction which the jury might draw from the facts." Therefore the fact that appellant did not except is immaterial, and the judgment of the lower court should be affirmed. While this argument is submitted the rights of the State are not waived under the other view of the case. Appellant did not except or request special instructions. He accepted and gained a decided advantage by the issue upon which his case was tried. Owing to the disposition of human nature to shrink from inflicting extreme punishment in cases where a lower punishment would readily be imposed an increased prospect of acquittal is given a defendant when the issue is liberty on the one hand or imprisonment for life or death on the other hand. Appellant claimed self-defense. An instruction covering all he claimed was given. To this instruction but one limitation was put. Appellant did not except. With what show of reason can he now claim that a new trial should be granted him because the court did not put yet another limitation upon his chances of acquittal? Having failed to except or to request special instructions, he must now show that the failure of the court to charge upon murder in the second degree, growing out of the imperfect right of self-defense, was a "material error calculated to injure the rights of the defendant." Such is the language of the statute as well as the voice of reason, recognized and enunciated by our highest tribunals and never questioned before. Counsel for appellant have not undertaken to deny the absolutely crushing and conclusive force of the State's evidence.

195 We present three disinterested and unimpeachable witnesses, whose testimony shows that appellant came upon deceased unawares; that deceased was sitting in a chair unsuspectingly reading a newspaper, and that appellant, without giving him the least warning or chance for his life, coolly and deliberately shot deceased as though he were a dog or a hog. The malignity of appellant's heart is further shown by the undisputed fact that he deliberately fired three shots at the back of a *prostitute*, unarmed, bleeding, and dying man, as though he not only was determined to take his life, but his heart was also fired by the devilish purpose of preventing deceased from obtaining pardon and favor with God. Appellant shot three times at the back of the head of poor B. C. Evans, when, with the rattle of death in his throat, he was praying to God to have mercy upon him. Appellant himself does not claim that he was excited then. No one else claims that appellant was excited then. Appellant did not deny that after the first shot, which shed the heart's blood of deceased, deceased called to him, "Oh, Mr. Davis, don't." Appellant did not deny that after deceased was prostrate upon the floor, with his face downwards and his back towards him, and while deceased was struggling with the "King of Terrors" and praying to God for that mercy which appellant had refused him, that he, appellant, stood over his victim and coolly and deliberately fired one, two, three shots. He could not deny. The holes made

by these cowardly and cruel shots yet mark the place from which the innocent blood of B. C. Evans cries aloud for justice. How, then, can it be said that appellant was injured by the failure of the court to charge murder in the second degree? If not injured he is not entitled to a reversal under the statute. Counsel for appellant cite Blocker's case. There is no similarity between that case and the case at bar. On the contrary, each presents the opposite extreme of the other. 1st. In Blocker's case the State failed to show previous ill will, and the defendant proved that on the day prior to the homicide the deceased and defendant were together and parted upon the most friendly terms. In the case at bar the State proved that appellant entertained ill will toward deceased for over one month, evidenced by his calling deceased a "dam- rascal." By appellant's own showing this ill will was intensified on the morning of the homicide. 2nd. The meeting between Blocker and the deceased at the time of the homicide was not shown to have been the result of design on the part of Blocker. In the case at bar the State has shown,
and the defendant's testimony corroborates the fact, that for
196 half an hour prior to the homicide the appellant did nothing
except hunt for and waylay the deceased, and that before beginning this hunt and evidently in pursuance of a former design appellant deliberately armed himself with a deadly weapon. 3rd. There were no eye-witnesses to the killing in Blocker's case. The circumstances of the killing are left entirely to conjecture. Two men, not only without enmity toward each other, but proven to be friends, met by chance. One is found dead. In a case like this the mind would naturally hesitate on account of the lack of evidence of express malice on the part of the State, as well as the positive, undisputed evidence of friendship on the part of the defendant. Murder in the second degree was a legitimate issue, and under the facts of the case the failure to charge upon the law of murder in the second degree, although not excepted to, was such a material error as was calculated to injure the rights of the defendant, and this is all that the court decided. In this case there are three eye-witnesses and many undisputed physical facts, all proving as clearly and conclusively as it is possible for human evidence to prove anything that appellant is an assassin of the deepest and blackest dye. 4th. In Blocker's case it was an undisputed fact that deceased was armed with a pistol, several barrels of which were empty and several barrels were loaded. In the case at bar it is an undisputed fact that deceased was not armed; that he had nothing in his pocket except a broken-bladed knife, a Masonic watch-charm, and twenty-five cents in money, and that he was found with his right hand doubled up under him, holding a newspaper. That the reversal in Blocker's case was proper cannot be denied by any one who will thoughtfully consider the facts as presented by the record; but counsel for appellant seize as drowning men upon the isolated clause in the opinion of Blocker's case on the subject of charging the law of murder in the second degree as follows: "It is only when there is no evidence tending to present that issue that such a charge may be safely omitted." They construe the clause as meaning that if there is any evidence tending to

present that degree the court must give such an instruction. There is a manifest difference between saying that a certain instruction cannot be safely omitted and in saying that the omission to give such an instruction will necessarily result in a reversal. In the first case the court says that the omission is unsafe; that it may or may not result in reversal. In the other case they would be saying that the omission would necessarily be fatal. Any of the serious
197 diseases to which human flesh is heir are dangerous and therefore unsafe, but the percentage of recoveries is ordinarily much greater than that of the deaths. To say that a certain thing is unsafe is very different from saying that it is fatal; but it — unfair to a court to construe language of an opinion except in connection with the particular point under discussion. It is also much more unfair to attempt to construe language in such a manner as to make the opinion of the court contradictory. In Blocker's case the rule now contended for was not discussed. In the light of the facts of that case the rule would not apply. It was immaterial whether an exception was taken to the charge or not, because the record shows that the omission to charge on murder in the second degree was a "material error calculated to injure the rights of the defendant," and, therefore, under the statute, the appellant was entitled to a reversal without reference to the question of an exception. In justice to the court it must be presumed that the language used had reference only to the particular facts of that case, and that it was not intended to alter or abridge a rule required by the statute and sanctioned by these express decisions which would be applicable to a different state of facts. Counsel may contend in their oral argument that a difference exists between charging upon defenses and offenses generally and in charging upon different degrees of the same offense. The length of this brief will prevent my discussing only possible objections. I will, however, remark that the Blocker case, which they invoke, is expressly against them on this point. In replying to this very objection Judge Willson says: "We have found no authority, however, which directly holds that an omission to submit to the jury the issue and law of murder in the second degree, when the evidence conclusively shows murder in the first degree, presenting no facts from which a jury might legitimately find murder in the second degree, will vitiate a conviction for murder in the first degree." As to the alleged error in the trial court in refusing a change of venue, I do not care to make any remarks besides those contained in the original brief for the State, beginning on page 31. I also refer the court to page 38 of the original brief for the State's reply to the alleged error in refusing a continuance. These are the only questions raised by appellant's brief for a rehearing. I trust that I am properly impressed with a proper sense of the solemnity of this occasion. I recognize its awful consequences to appellant if the judgment of the lower court be affirmed. The prosecution of this
198 case has been a most unpleasant and painful duty to me. If it were only the question of punishment of the appellant I would never have undertaken it; but a greater question is at stake.

The life of appellant is of course important, but the peace and well-being of society and the sanctity of human life is infinitely more important. It is for these sacred interests that I plead. Under the facts of this case I am defending, not prosecuting. I ask for protection; not venge-nce. With all the earnestness of conviction I submit that appellant has forfeited his life to society, and that public justice demands his execution in order that assassination may be made dangerous as well as odious, and that the men, women, and children of Texas may be secure in their lives. Counsel for appellant, in their brief, express their belief in and profound reverence for God. It is, therefore, not inappropriate to close the plea for the State with a citation of the Divine law upon the subject of assassination: "Whoso sheddeth man's blood, by man shall his blood be shed, for in the image of God made He man." Gen. ix, 6. "He that smiteth a man, so that he die, shall surely be put to death." Ex. xxi, 12. "But if a man come presum-tuously upon his neighbor, and slay him, thou shalt take him from mine altar, that he may die." Ex. xxi, 14. "And he that killeth any man shall surely be put to death." Lev. xxix, 17. "But if a man hate his neighbor, and lie in wait for him, and rise up against him and smite him mortally that he die and fleeth unto one of these cities; then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die. Thine eye shall not pity him, but thou shalt put away the guilt of innocent blood from Israel, that it may go well with thee." Deut. xix, 11. "Moreover, ye shall take no satisfaction for the life of a murderer, which is guilty of death, but he shall surely be put to death." "And ye shall take no satisfaction from him that is fled to the city of his refuge, that he shall come again to dwell in the land, until the death of the high priest." "So ye shall not pollute the land wherein ye are, for blood it defileth the land; and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it." Numbers xxxv, 31.

The appellant has had a fair trial before a jury, every one of whom he voluntarily accepted. Upon his own showing he is an assassin. He was represented upon the submission of the case in this court by his counsel, who not only made an oral argument, but also filed an elaborate brief. This court affirmed the judgment of con-
199 viction. No sufficient cause is now shown for setting aside this solemn judgment.

HENRY M. FURMAN,
Of Counsel for State.

Endorsements: In the court of appeals. J. W. Davis *vs.* The State of Texas. Replication to appellant's motion for a rehearing. Henry M. Furman, of counsel for State. Filed in court of appeals May 24, 1890, at Austin, Texas. P. Walton, clerk.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing, from the middle of page 177 to and including the last line above this certificate, con-

tains a true and correct copy of the reply of the State to appellant's motion for a rehearing filed in the court of appeals of the State of Texas in the cause of J. W. Davis, appellant, *v.* The State of Texas, appellee, as from the records of my office is manifest.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Order Transferring Motion for Rehearing to Galveston, Dec. 21, 1889.

J. W. DAVIS *vs.* THE STATE. } December 21, 1889. Appeal from Tarrant County. Motion for Rehearing Transferred to Galveston.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the three lines next above contain a correct copy of the order of said court of appeals made at Tyler in the cause of J. W. Davis *v.* The State of Texas on December 21, 1889, as appears of record in my office.

In witness whereof I hereto sign my name and affix my seal of office on this 2nd day of Jan'y, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals, at Tyler.

200 *Order Transferring Motion for Rehearing to Austin, March* 21, 1890.

Be it remembered that at a term of the honorable court of appeals of the State of Texas, begun and holden at the city of Galveston, on the first Monday of January, A. D. 1890, when there was present the Hon. John P. White, presiding judge, and Judge Sam. A. Willson, the following orders, among others, were made on, to wit, March 21, 1890:

J. W. DAVIS, Appellant, *vs.* THE STATE OF TEXAS, Appellee. } No. 2787. From Tarrant County. On Motion for Rehearing.

March 21, 1890.—Taken under advisement and transferred to Austin.

I, H. A. Morse, clerk of the court of appeals of Texas, at Galveston, hereby certify that the foregoing is a true and correct copy of all the orders made by this court at the Galveston branch in the above entitled and numbered cause.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Galveston, this the 25th day of March, 1890.

[SEAL.] H. A. MORSE, *Clerk*

Endorsements: Copy of orders made at Galveston. No. 2787. J. W. Davis, appellant, *vs.* The State of Texas, appellee. Recorded, page 200. Filed in court of appeals Mar. 29, 1890, at Austin, Texas. P. Walton, clerk. Filed in court of appeals, at Tyler, June 21st, 1890. E. P. Smith, clerk.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above matter contained on this page is a correct copy of a certified copy of the orders of said court made at Galveston, at the Galveston term of said court, 1890, and now on file in my office, as from the records of my office is manifest.

Given under my hand and the seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1890.

[Seal of Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

201 *Order Overruling Motion for Rehearing. June* 4, 1890.

Be it remembered — at a term of the honorable court of appeals of the State of Texas, begun and holden at Austin on the 7th day of April, A. D. 1890—present, Hon. John P. White, presiding judge, and Judges J. M. Hurt and Sam. A. Willson, in the cause of—

J. W. DAVIS
vs.
THE STATE OF TEXAS. } No. 6866. Tarrant County.

The following orders were made:
June 4, '90.—Motion for rehearing overruled.
Written opinion delivered by Hurt, J.

I, P. Walton, clerk of the court of appeals of the State of Texas, at the city of Austin, hereby certify that the foregoing is a true copy of the orders made by this court in the above entitled and numbered cause.

In witness whereof I hereunto set my hand and affix the seal of said court, at Austin, this 4th day of June, 1890.

[SEAL.] P. WALTON, *Clerk.*

Endorsements: No. 6866. Court of appeals of the State of Texas. J. W. Davis *vs.* The State. Copy of orders. Recorded, p. 201. Filed in court of appeals, at Tyler, June 21st, 1890. E. P. Smith, clerk.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above matter contained on this page is a true and correct copy of a certified copy of the orders made by said court of appeals at the Austin term, 1890, thereof, and now on file in my office, as from the records of my office is manifest.

Seal Court of Appeals of Texas.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

202 *Opinion on Motion for Rehearing. Filed June* 4, 1890.

J. W. DAVIS } No. 6866. 5 Mo. No. 7. On Motion
vs. } for Rehearing.
THE STATE. }

We have read carefully the motion and brief thereon, and have listened with pleasure and interest to the arguments for and against the same. As in the first opinion, so in this, we will discuss but one question, all the other supposed errors being fully met by brief for the State. As there is some evidence tending to reduce the offense from murder of the first to murder of the second degree, though its force be ever so weak, trivial, or light, counsel for the motion contend that it is not only the duty of the court below to instruct the jury on the less degree, but a failure to so instruct is reversible error, whether the omission was objected to at the time or not. We conclude that under such a state of case it would be the duty of the court to charge on murder of the second degree, because this is required by the statute; but as there were no objections made to the charge because of this omission at the time, so as to bring the case within the provisions of art. 685, C. C. P., does it follow that the judgment must be reversed whether the defendant excepted to the charge or not? This is the question, and we understand that counsel for the motion assume the affirmative, contending that if there be any evidence tending to present murder of the second degree or any degree of homicide less than murder of the first degree the judge must charge the less degree or degrees, whether requested or not, and that a failure to do so will work a reversal of the judgment, though the charge was not excepted to at the time. If this proposition be correct the party who fails to except to the charge occupies a position as favorable as one who objects. Diligence in bringing forward the objection at the earliest opportunity has no reward, the careful and the diligent and the careless or negligent standing on the same plane. In this connection we call attention to the opinion of Roberts, chief justice, in Bishop *v.* The State (43 Tex., 390). He says: "This difference in the rule, dependent upon the time when the objection to the action of the court
203 is made, is in harmony with the rules of judicial proceedings generally, that a party who makes an objection at the proper time, which is usually the first practical opportunity, shall have his objection more favorably considered than if it had been inopportunely delayed." In the above the chief justice is wrong if counsel for appellant be right. The statute provides, as is well known to the profession, that if there be error in the charge in a felony case and it is excepted to at the time of the trial, the judgment shall be reversed; but suppose there be error and the accused fails to accept, will the judgment be reversed in all such cases? By no means. We will let Chief Justice Roberts state the rule applicable to such a state of case: "It is to be particularly noticed that the record shows, and properly by a bill of exceptions shows, in this case that this charge

was excepted to by defendant's counsel at the time of the trial and before the case had been submitted to the jury, and before they had retired to consider of their verdict, and that thus an opportunity was given to the judge to correct or withdraw the charge if he had deemed it to have been improper, upon a reconsideration of it then made, before the final submission of the case to the jury. This, in reference to the provisions of our Code of Criminal Procedure, will be found to be an important consideration in this case on appeal to this court, by the exceptions having been made and shown by the bill of exceptions to have been made at the time of the trial, and to be much more beneficial to the defendant than if not then made, but made only afterwards, on a motion for a new trial. If such a charge is not excepted to at the time of the trial but presented in a motion for new trial, which is the next point at which it could be presented, then its consideration by this court would be subject to another and a very different rule, which would be whether or not such charge was an error which, under all the circumstances as exhibited in the record, was "calculated to injure the rights of the defendant," and which is prescribed as one of the grounds for the granting of a motion for a new trial in the following language: "Where the court has misdirected the jury as to the law, or has committed any other material error calculated to injure the rights of the defendant." With what degree of force must the evidence be that tends to establish an offense or tends to mitigate the offense charged in order to require a charge applicable thereto? Chief Justice Roberts says that if its force is deemed to be very weak, trivial, or light and its application remote "the court is not required to give a
204 charge upon it." "If, on the other hand, it is so pertinent and favorable as that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, the court should charge so as to furnish them with the appropriate rule of law upon the subject." (Bishop *v.* The State.) Hence, unless the evidence tending to present a less degree of an offense, or any theory of defense, be so pertinent and forcible that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, a failure of the court to charge thereon would not be ground for a reversal in the absence of exceptions. This position is in exact harmony with the first opinion in this case and in accord with Bishop *v.* The State, *supra*, and a number of cases decided by this court, notably Cunningham *v.* State, 17 C't App., 96; Elam *v.* State, 16 C't App., 40, and Luper *et al. v.* State, present term; see also Johnson *v.* State, 27 Tex., 766. Loose exprssions upon this subject can be found in the opinions of this court, but the principle is well settled and is absolutely correct, whether this court has always adhered to it or not, that in the absence of exceptions to the charge of the court, for this court to reverse the evidence tending to present a phase of the case or theory favorable to the accused must be so pertinent and favorable that it might reasonably, not possibly, be supposed that the jury could be influenced by it in arriving at their verdict. Unless the evidence be of such a character no injury appears, no injury is probable—not possible but probable—and unless

this appears there is no ground for a reversal of the judgment, and to reverse in the absence of probable injury would be contrary to principle. This would be the rule as to errors in the charge of the court, though excepted to, but for the statute. Was the evidence presenting murder of the second degree of such force and pertinency as to render it reasonably probable that the jury would have been influenced thereby in arriving at their verdict? As there was no exceptions to the charge, this is the vital question. Counsel for the motion in their argument carefully avoided a discussion of this question when it was the very issue for discussion, and to determine this issue the facts must be carefully examined. When these are consulted, instead of presenting murder of the second degree with such force and pertinency as would render it reasonably probable that the jury would be influenced thereby in arriving at their verdict, when taken as a whole, this degree of homicide is very feebly or lightly indicated. This being the case, no injury is probable,
205 and hence no reversible error. We are of the opinion that there is no reason why the motion for rehearing should be granted, and it is therefore overruled.

J. M. HURT,
Judge C't App.

Endorsements: J. W. Davis *v.* The State. Opinion on motion for rehearing. Overruled. Filed in court of appeals Jun- 4, 1890, at Austin, Texas. P. Walton, clerk. To be reported. Hurt, J. Filed in court of appeals, at Tyler, June 21st, 1890. E. P. Smith, clerk.

I certify the foregoing, from the beginning of page 202 to the last line above, to be a correct copy of the opinion of the court of appeals of Texas delivered on motion for rehearing in case of J. W. Davis *v.* The State, as from the records of my office is manifest.

Given under my hand and official seal Jan'y 2, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Petition for Writ of Error. Filed August 4th, 1890.

J. W. DAVIS *vs.* THE STATE OF TEXAS. } Petition for Writ of Error to Supreme Court of the United States.

To the Hon. John P. White, presiding judge of the court of appeals of the State of Texas:

Comes now J. W. Davis, the petitioner in the above cause, and presents to your honor that he is a citizen of the United States and of the State of Texas, and as such is entitled to full protection under the laws and Constitution of the United States; that the Hon. R. E. Beckham is the judge of the State district court of and for the district of Tarrant county, Texas, which district is known as the 17th

judicial district of the State of Texas, and that said district court has jurisdiction of all criminal causes of the grade of felony to try said causes originally upon the law and the evidence, and that the highest court of the State of Texas having appellate jurisdiction in said grade of offenses is the court of appeals of the State of Texas, and that the Hon. John P. White, to whom this petition is presented, is the presiding judge of said court of appeals, the Hon. Sam. A. Wilson and the Hon. J. M. Hurt being the associate judges of said court of appeals; that heretofore, on the 10 day of September, 1889, in said district court, twelve men, purporting to constitute the grand jury of said county, presented and filed in said district court an instru-
206 ment in the form and style of a bill of indictment, charging your petitioner with the offense of murder, said offense being designated a felony by art. 609 of what is known as the Penal Code of the State of Texas, said cause being styled and numbered in said State district court as follows: No. 5563, The State of Texas *vs.* J. W. Davis; that such pretended bill of indictment avers, after stating the date and venue, that the defendant, your petitioner, "did, with his express malice aforethought, kill and murder one B. C. Evans by shooting him with a pistol," and that said indictment does not aver that petitioner did shoot said B. C. Evans with a pistol, and thereby fails to aver directly the doing of any act by the defendant which did result in the death of said Evans, or any act calculated to produce the death of said B. C. Evans, or any deliberation or premeditation on the part of your petitioner; that said indictment failing to charge the defendant with the commission of any act with deliberation or premeditation resulting in the death of said B. C. Evans, said indictment charges no offense at all, and is therefore null and void and is not an indictment for murder. Wherefore your petitioner says that he has been convicted of a felony, with the death penalty affixed, without having first been indicted by a grand jury, which is contrary to article 5 of the Constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;" that on the trial of said cause in said district court on the 11th day of October, 1889, twelve men, who had theretofore during said trial been empaneled and sworn as a petit jury by said State district court to try said cause, returned and filed in said court a verdict convicting said defendant of the offense of murder in the first degree and fixing his punishment at death, upon which verdict judgment was entered accordingly by said State district court; that within the time prescribed by the laws of the State of Texas your petitioner perfected and entered his appeal from said judgment to said court of appeals of the State of Texas, sitting at the city of Tyler, and that said appeal was within proper time thereafter duly filed and docketed, together with a complete transcript of the record of said cause from said State district court, in the said State court of appeals, at Tyler; that thereafter, at a regular term of our said court of appeals, at Tyler, to wit, on the 12 day of December, 1889, upon the hearing of said appeal, our said court of appeals therein rendered judgment affirming said judg-

ment of the said State district court; that immediately there-
207 after, and within the time prescribed by the laws of the State of Texas, your petitioner, believing both said judgment of said State court and the proceedings in said court had, as well as said judgment of affirmance by the court of appeals, to be erroneous and void, as contrary to the sections of the Constitution of the United States hereinafter designated, filed and had duly entered and docketed in said court of appeals his motion for rehearing in said cause, and that upon hearing of said motion the same was by our court of appeals, on the 4th day of June, 1890, overruled, by which said judgment was made final in said State courts. Your petitioner further says that if said judgment is carried into execution your petitioner will be deprived of his life and suffer death, by being hanged, without the process of law and in violation of section 1 of the fourteenth amendment of the Constitution of the United States, which provides "that no State shall deprive any person of life, liberty, or property without due process of law," because he says that articles 605, 606, and 609 of the Penal Code of the State of Texas, defining and describing the punishment for murder, are null and void and are not statutes or law, because neither of said articles of the Penal Code have ever been passed or enacted into a law by either house of the Legislature of the State of Texas, nor by the Congress of the United States, nor by any other legislative power, and that a conviction under said void articles is contrary to section 4 of article 4 of the Constitution of the United States, which provides "that the United States shall guarantee to every State in this Union a republican form of government," which contemplates the enactment of laws by the people through their properly constituted legislative bodies and not the making or promulgation of a statute by any one man without the will or consent of the people. Petitioner further says that there is no other law in force in the State of Texas authorizing or providing for the trial or conviction or punishment of any person for the offense of murder, and that said articles referred to are not law, but are null and void. Your petitioner further says that article 607 of the Penal Code of the State of Texas, which is a valid and subsisting law of the said State, reads as follows: "If the jury shall find any person guilty of murder they shall also find by their verdict whether it is of the first or second degree, and if any person shall plead to an indictment for murder a jury shall be summoned to find of what degree of murder he is guilty;" that said
statute was a valid law, in full force and effect at the time of the
208 commission of the homicide charged in this cause and at the time of the trial of said cause in said State district court, and is mandatory in its requirement that the jury and not the judge shall pass upon the two degrees of murder; notwithstanding which said State district judge, on the trial of your petitioner in said State district court, in effect repealed said statute and then and there made in writing and read in charge to the jury a different rule of law, commanding said jury not to allow your petitioner the protection of said statute and not to find whether your petitioner was guilty of the second degree of murder, but that said jury should only con-

sider and find as to the first degree and not as to the second degree, said judge then and there enforcing said rule in writing as a new law in said cause, taking the place of said article 607 of the Penal Code and repealing the same for the purposes of said trial of your petitioner, which said law or rule so promulgated and enforced by said State judge was in the nature of an *ex post facto* law, and also denied to your petitioner the equal protection of the law set forth in said article 607 of the Penal Code, said judge being an officer of the State of Texas; all of which unlawful procedure is contrary to the last clause of section one of the 14th amendment of the Constitution of the United States, which provides: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws." The said promulgation and enforcement of said rule in writing was therein by said judge stated to be the law, and thereby it repealed and took the place of said statute; all of which is in direct violation of section 1, article 9, of the Constitution of the United States, which forbids the making of any *ex post facto* law; that all of said questions and matters herein complained of were involved and drawn in question in the trial of said cause, both in the State district court and in the court of appeals, and were by each of said courts decided against your petitioner. Wherefore your petitioner prays that he be allowed a writ of error to the Supreme Court of the United States in said cause, that said matters may be reviewed and said error be corrected by said Supreme Court. Your petitioner further presents that since the final affirmance of the judgment of this court the mandate of the court of appeals has been sent down to said State district court, and that your petitioner will be executed and suffer death under said judgment before the next term of the Supreme Court of the United States unless said proceeding is stayed by
209 a supersedeas, the said State court having sentenced said petitioner to be hanged on the first day of September, 1890, while the said Supreme Court of the United States does not convene, being now in vacation, until the second Monday in October, 1890. Wherefore your petitioner prays your honors to allow your petitioner a writ of error, directed to the clerk of the court of appeals of Texas, at Tyler, and a supersedeas to the sheriff of Tarrant county, that petitioner's life may be spared until said cause can be decided by the Supreme Court of the United States, as provided by section 1040, Rev. Stats. United States. Your petitioner further says that all of said matters and questions are fully shown by the record of said cause, which is here submitted for the inspection of your honor, said record remaining with E. P. Smith, the clerk of the court of appeals, at Tyler, Texas, and that your petitioner is now, in accordance with the laws of the State of Texas, confined in the jail of Tarrant county, Texas, in the custody of J. C. Richardson, the sheriff of said Tarrant county, to await the final decision of this cause.

Respectfully submitted. BYRON G. JOHNSON,
July 31st, 1890. *Attorney for Petitioner, J. W. Davis.*

Allowed.

JOHN P. WHITE,
P. J. Court of Appeals of Texas.

Endorsements: No. 3329. J. W. Davis *vs.* The State of Texas. Petition for writ of error. Filed in court of appeals, at Tyler, August 4th, 1890. E. P. Smith, clerk.

I certify the foregoing, from the middle of page 205 to the line last above, to be a correct copy of appellant's petition for writ of error in cause of J. W. Davis *v.* State of Texas, now on file in my office.

Given under my hand and seal of office, at Tyler, Jan'y 2, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Original Writ of Error and Supersedeas. Filed August 4, 1890.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the court of appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition
210 of the judgment of a plea which is in said court of appeals, before you, between J. W. Davis, who is appellant, and The State of Texas, who is appellee, No. 3329 on the docket of said court of appeals, sitting at Tyler, in said State, a manifest error hath happened, to the great damage of the said J. W. Davis, who is plaintiff in error herein, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done, and that the execution of said judgment be stayed until this writ of error is disposed of.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the thirty-first day of July, in the year of our Lord one thousand eight hundred and ninety, and seal of our said circuit court, at Austin, in the 114th year of the Independence of the United States.

D. H. HART,
[SEAL.] *Clerk of the Circuit Court of the United States,*
West. Dist. of Texas, at Austin,
By GEO. F. JERNIGAN, *Deputy.*

Allowed by—
JOHN P. WHITE,
P. J. Court of Appeals of Texas.

Endorsements: In the Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Writ of error to Supreme Court of the United States. Issued 31st day of July, A. D. 1890. D. H. Hart, clerk of the circuit court of the United States, west. dist. of Texas, at Austin, by Geo. F. Jernigan, deputy. Filed in court of appeals, at Tyler, August 4th, 1890. E. P. Smith, clerk.

I certify the above matter on this page and 5 lines on the preceding one to be a correct copy of the original writ of error and supersedeas in the court of appeal- of Texas in the cause of J. W. Davis *v.* State of Texas, as from the records of my office is manifest.

Given under my hand and official seal, at Tyler, Jan'y 2, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

211 *Copy of Writ of Error & Service of Supersedeas. Filed Sept.* 8, 1890.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the court of appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in said court of appeals, before you, between J. W. Davis, who is appellant, and The State of Texas, who is appellee, No. 3329 on the docket of said court of appeals, sitting at Tyler, in said State, a manifest error hath happened, to the great damage of the said J. W. Davis, who is plaintiff in error herein, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done, and that the execution of said judgment be stayed until this writ of error is disposed of.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court, the thirty-first day of July, in the year of our Lord one thousand eight hundred and ninety, and seal of our said circuit

court at Austin, in the 114th year of the Independence of the United States.

[SEAL.]

D. H. HART,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin,
By GEO. F. JERNIGAN, *Deputy.*

Allowed by—
JOHN P. WHITE,
P. J. Court of Appeals of Texas.

UNITED STATES OF AMERICA, }
Western District of Texas. }

I, D. H. Hart, clerk of the United States circuit court in and for the western district of Texas and fifth circuit, at Austin,
212 hereby certify that the above is a true and correct copy of the original writ of error issued this day by the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, under my test and seal of this court.

Witness my hand and official seal, at office, in the city of Austin, this the 31st day of July, A. D. 1890.

[SEAL.]

D. H. HART, *Clerk,*
By GEO. F. JERNIGAN, *Deputy.*

Endorsements: In the Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Writ of error to Supreme Court of the United States. Issued 31st day of July, A. D. 1890. D. H. Hart, clerk of the circuit court of the United States, west. dist. of Texas, at Austin, by Geo. F. Jernigan, deputy. I hereby certify that I on this day delivered to J. C. Richardson, the sheriff of Tarrant county, Texas, a certified copy of the original writ of error in the within-stated case, of which original writ this is also a certified copy. Witness my official signature this 28 day of Aug., 1890. Geo. A. Knight, U. S. marshal, N. D. of Texas, per W. J. McDonald, deputy. Filed in court of appeals at Tyler September 8th, 1890. E. P. Smith, clerk.

I certify that the preceding page, 211, and the matter on this page above this certificate contains a true copy of the copy of writ of error and service of supersedeas in the court of appeals of Texas in the case of J. W. Davis *v.* State of Texas, as from the records of my office is manifest.

Given under my hand and seal — office, at Tyler, Texas, Jan'y 2, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Assignment of Errors. Filed September 4, 1890.

J. W. DAVIS
vs.
THE STATE OF TEXAS. } On Error to the Supreme Court of the United States.

Assignments of error.

To the honorable the Supreme Court of the United States:

Comes J. W. Davis, the plaintiff in error in the above cause, and presents the following assignment of error as manifest upon the record of said cause:

First assignment.

213 Plaintiff in error was tried and convicted under article 605, 606, and 609 of the Penal Code of the State of Texas, which articles define and prescribe the punishment of the offense of murder in the State of Texas; and the plaintiff in error avers that neither of said articles have ever been passed or enacted into a law by the Legislature of the State of Texas, by the Congress of the United States, nor by any other legislative power, and therefore that neither of said articles are law, but that each of them is null and void and have not the force or effect of law, and that the judgment of the court of appeals of the State of Texas affirming the judgment of the court below is on said ground here assigned as error.

Second assignment.

The question of the validity of the said above-numbered articles of said Penal Code was directly involved in the hearing of said cause before the court of appeals of the State of Texas, and was by said court of appeals decided against plaintiff in error and in favor of the validity of said articles of the Penal Code, which ruling is in violation of section 4, article 4, of the Constitution of the United States, which provides "that the United States shall guarantee to every State in this Union a republican form of government," which contemplates the enactment of laws by the people through their properly constituted legislative bodies, and not the making or promulgation of a statute by any one man without the will, consent, or authority of the people; and upon said grounds said ruling of the court of appeals of the State of Texas affirming the validity of said pretended statutes is here assigned as error.

Third assignment.

Plaintiff in error further avers that said articles 605, 606, 609 of said Penal Code of the State of Texas being null and void, there is no other statute or law of said State authorizing or providing for the trial or punishment of any person for the offense of murder, and that said decision of the court of appeals of the State of Texas affirming the judgment and sentence of death rendered by the court

below is contrary to section 1 of the fourteenth amendment of the Constitution of the United States, which provides "that no State shall deprive any person of life, liberty, or property without due process of law," because said articles of the Penal Code of the State of Texas above named are not law, but are null and void; and upon this ground said decision of the court of appeals of the State of Texas is here assigned as error.

214 Fourth assignment.

The pretended bill of indictment in this case does not aver that plaintiff in error did shoot, strike, assault, or wound the deceased, nor that he did any other act toward or against the deceased which was calculated to produce or did produce the death of the deceased; wherefore said instrument does not charge the commission of any act or deed, and therefore is not an indictment for the offense of murder nor for any other offense; and hence said decision of the court of appeals of the State of Texas affirming the judgment and sentence of death rendered in this cause by the State district court is contrary to article 5 of the Constitution of the United States, which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;" and said decision of the court of appeals of Texas affirming said judgment of the State district court is upon this ground here assigned as error.

Fifth assignment.

On the trial of this cause in the State district court the plaintiff in error presented his sworn application for a continuance of the case to the next term of that court, in order to procure the presence and testimony of two witnesses in his behalf, and set forth in said application the names and residence of said witnesses, the facts expected to be proved by them, and showed in said application that he was at that time using compulsory process to compel the attendance of said witnesses and that the testimony of said witnesses was material to his defense in said cause. The judge of said State district court decided that the testimony of said absent witnesses was not true, and held that plaintiff in error had not the right to submit said evidence to the jury, and that he had not the right to a trial by jury as to his evidence, but that the cause should be tried by jury as to the State's evidence alone, in the absence of the defendant's witnesses. The State court of appeals decided that said rulings of the State district judge were right; which decision of the court of appeals is contrary to article 6, amendments to the Constitution of the United States, which reads as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor." Said decision violates said article of the Constitution of the United States by denying the prisoner the right of
215 trial by jury and of having his witnesses and evidence in court by compulsory process, and by allowing the State dis-

trict judge to pass upon the truth of the prisoner's evidence in the absence of the jury, and without allowing the prisoner the right to examine his witnesses upon oath in open court in his behalf; and upon these grounds said decision of the State court of appeals is here assigned as error.

Sixth assignment.

The decision of the State court of appeals sustaining the action of the State district court in denying the prisoner's right to have his evidence in court was based upon article 560 of the Code of Criminal Procedure of the State of Texas, which provides that a motion for a continuance made by a defendant in a criminal trial shall not be granted as a matter of right, but that in case of conviction, if it appears to the judge from the evidence adduced on the trial that the evidence of the absent witnesses named in the application for continuance was material and probably true, a new trial should be granted; which said statute is contrary to article 6, amendments to the Constitution of the United States, quoted in the last above assignment of error, because it denies the prisoner the right of trial by jury as to the evidence in his favor; because it deprives the prisoner of his right to have his evidence in court by compulsory process; because it deprives the prisoner of his right to have the truth or falsity of the evidence in his favor decided by the jury and not by the judge, and because it allows the State the right of trial by jury as to its evidence and denies the right to the prisoner as to his evidence, leaving the judge to decide the prisoner's evidence and the jury to decide the State's evidence. The decision of the State court of appeals holding said statute to be valid and constitutional is here assigned as error.

Seventh assignment.

Plaintiff in error further says that article 607 of the Penal Code of the State of Texas reads as follows. "If the jury shall find any person guilty of murder they shall also find by their verdict whether it is of the first or second degree, and if any person shall plead guilty to an indictment for murder a jury shall be summoned to find of what degree of murder he is guilty." That said statute was a valid law, in full force and effect at the time of the commission of the homicide charged in this case and at the time of the trial of said cause in said State district court, and is mandatory in its re-
216 quirement that the jury and not the judge shall pass upon the two degrees of murder; notwithstanding which said State district judge, on the trial of plaintiff in error in said State district court, in effect repealed said statute, and then and there made in writing and read in charge to the jury a different rule of law, commanding said jury not to allow plaintiff in error the protection of said statute and not to find whether your plaintiff in error was guilty of the second degree of murder, but that said jury should only consider and find as to the first degree and not as to the second degree, said judge then and there enforcing said rule in writing as a new law in said case, taking the place of said article 607 of the

below is contrary to section 1 of the fourteenth amendment of the Constitution of the United States, which provides "that no State shall deprive any person of life, liberty, or property without due process of law," because said articles of the Penal Code of the State of Texas above named are not law, but are null and void; and upon this ground said decision of the court of appeals of the State of Texas is here assigned as error.

214 Fourth assignment.

The pretended bill of indictment in this case does not aver that plaintiff in error did shoot, strike, assault, or wound the deceased, nor that he did any other act toward or against the deceased which was calculated to produce or did produce the death of the deceased; wherefore said instrument does not charge the commission of any act or deed, and therefore is not an indictment for the offense of murder nor for any other offense; and hence said decision of the court of appeals of the State of Texas affirming the judgment and sentence of death rendered in this cause by the State district court is contrary to article 5 of the Constitution of the United States, which provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;" and said decision of the court of appeals of Texas affirming said judgment of the State district court is upon this ground here assigned as error.

Fifth assignment.

On the trial of this cause in the State district court the plaintiff in error presented his sworn application for a continuance of the case to the next term of that court, in order to procure the presence and testimony of two witnesses in his behalf, and set forth in said application the names and residence of said witnesses, the facts expected to be proved by them, and showed in said application that he was at that time using compulsory process to compel the attendance of said witnesses and that the testimony of said witnesses was material to his defense in said cause. The judge of said State district court decided that the testimony of said absent witnesses was not true, and held that plaintiff in error had not the right to submit said evidence to the jury, and that he had not the right to a trial by jury as to his evidence, but that the cause should be tried by jury as to the State's evidence alone, in the absence of the defendant's witnesses. The State court of appeals decided that said rulings of the State district judge were right; which decision of the court of appeals is contrary to article 6, amendments to the Constitution of the United States, which reads as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor." Said decision violates said article of the Constitution of the United States by denying the prisoner the right of
215 trial by jury and of having his witnesses and evidence in court by compulsory process, and by allowing the State dis-

trict judge to pass upon the truth of the prisoner's evidence in the absence of the jury, and without allowing the prisoner the right to examine his witnesses upon oath in open court in his behalf; and upon these grounds said decision of the State court of appeals is here assigned as error.

Sixth assignment.

The decision of the State court of appeals sustaining the action of the State district court in denying the prisoner's right to have his evidence in court was based upon article 560 of the Code of Criminal Procedure of the State of Texas, which provides that a motion for a continuance made by a defendant in a criminal trial shall not be granted as a matter of right, but that in case of conviction, if it appears to the judge from the evidence adduced on the trial that the evidence of the absent witnesses named in the application for continuance was material and probably true, a new trial should be granted; which said statute is contrary to article 6, amendments to the Constitution of the United States, quoted in the last above assignment of error, because it denies the prisoner the right of trial by jury as to the evidence in his favor; because it deprives the prisoner of his right to have his evidence in court by compulsory process; because it deprives the prisoner of his right to have the truth or falsity of the evidence in his favor decided by the jury and not by the judge, and because it allows the State the right of trial by jury as to its evidence and denies the right to the prisoner as to his evidence, leaving the judge to decide the prisoner's evidence and the jury to decide the State's evidence. The decision of the State court of appeals holding said statute to be valid and constitutional is here assigned as error.

Seventh assignment.

Plaintiff in error further says that article 607 of the Penal Code of the State of Texas reads as follows. "If the jury shall find any person guilty of murder they shall also find by their verdict whether it is of the first or second degree, and if any person shall plead guilty to an indictment for murder a jury shall be summoned to find of what degree of murder he is guilty." That said statute was a valid law, in full force and effect at the time of the commission of the homicide charged in this case and at the time of the trial of said cause in said State district court, and is mandatory in its re-
216 quirement that the jury and not the judge shall pass upon the two degrees of murder; notwithstanding which said State district judge, on the trial of plaintiff in error in said State district court, in effect repealed said statute, and then and there made in writing and read in charge to the jury a different rule of law, commanding said jury not to allow plaintiff in error the protection of said statute and not to find whether your plaintiff in error was guilty of the second degree of murder, but that said jury should only consider and find as to the first degree and not as to the second degree, said judge then and there enforcing said rule in writing as a new law in said case, taking the place of said article 607 of the

Penal Code of the State of Texas and repealing the same for the purposes of said trial of this plaintiff in error; which said law or rule so promulgated and enforced by said State district judge was in the nature of an *ex post facto* law, and also denied to plaintiff in error the equal protection of the laws set forth in said article 607 of the Penal Code of the State of Texas; that said new law so promulgated and enforced by said State district judge in this particular case was then and there reduced to writing by said judge and by him then and there read to the jury as the law of the case, and by said judge then and there made a law of this case, and thereby repealed and took the place of said article 607 of the Penal Code of said State, said State district judge being an officer of the State and having authority by the laws of said State to write and read in charge to the jury such law as shall govern the case on trial, the jury being required by the laws of said State to decide the case according to the law as written out and made by the judge and read to the jury by him and not by the law as enacted by the Legislature and printed in the Code of Texas, the statute of Texas governing said matter being as follows: Code of Criminal Procedure of the State of Texas, article 676: "The jury are the exclusive judges of the facts in the case, but not of the law in any case. They are bound to receive the law from the court and to be governed thereby." That said promulgation and enforcement of said new law and rule of procedure by said State district judge is in violation of section 1, articles 9 and 10, of the Constitution of United States, which prohibits the making or enforcement of any *ex post facto* law, and is also in direct violation of the last clause of section 1 of the fourteenth amendment to the Constitution of the United States,

which provides: "Nor shall any State deny to any person
217 within its jurisdiction the equal protection of the laws."

That all of said questions presented in the above assignments of error were involved and drawn in question on the trial of this case in both the State district court and the court of appeals of Texas, and were by both of said courts decided against the plaintiff in error, and are here assigned as error in the Supreme Court of the United States in this cause. Wherefore the plaintiff in error prays the Supreme Court of the United States to consider and revise said errors, to correct the same, and that the decisions of the court of appeals and of the State district court of said State of Texas be reversed, and that this cause be remanded for a new trial, in accordance with the opinion of the Supreme Court of the United States.

Respectfully submitted.

BYRON G. JOHNSON,
Attorney for J. W. Davis, the Plaintiff in Error.

Endorsements: No. 3329. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Assignment of errors. Filed in court of appeals, at Tyler, September 4th, 1890. E. P. Smith, clerk.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing, from the 10th line

from the bottom of page 212 to the line last above, contains a true and correct copy of appellant's assignment of errors to the Supreme Court of the United States in the case of J. W. Davis, appellant, *v.* The State of Texas, appellee, in the said court of appeals of Texas, now on file in my office, as from the records of my office is manifest.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

Seal Court of Appeals of Texas.

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

218 *Clerk's Motion for Leave to Enter Judgment on Motion for Rehearing Nunc pro Tunc. Filed September* 12, 1890.

In the Court of Appeals of Texas.

In cause No. 6866, entitled—

J. W. DAVIS
v.
THE STATE OF TEXAS. } Appeal from Tarrant County District Court.

And now, on this day, comes P. Walton, clerk of the court of appeals, at Austin, and makes known to the court that on the 4th day of June, A. D. 1890, in the above-styled cause, an order and judgment was made and rendered by the court overruling the motion for a rehearing made and submitted by the appellant, J. W. Davis, and refusing the same; that by mistake and inadvertence said order and judgment was not properly entered upon the minutes of the court; that the only entry made upon the minutes in regard to the overruling of said motion for rehearing is in words and figures as follows, to wit: "June 4th, 1890. Motion for rehearing overruled. Written opinion delivered by Hurt, J." The premises considered, it is prayed that service of this motion and application be had in accordance with law upon the said J. W. Davis and upon Byron G. Johnson, Esq., his attorney of record, both of whom reside in Tarrant county, Texas, and that an order and judgment be entered *nunc pro tunc* at Tyler term, 1890, to conform to the order and judgment actually and in fact made and rendered by this court in this behalf at the last Austin term, on, to wit, June 4th, last aforesaid.

P. WALTON, *Clerk, &c.*

Endorsements: Mo. No. 6866. Cause No. 3329. J. W. Davis *vs.* The State of Texas. Motion to enter order and judgment *nunc pro tunc.* Filed in court of appeals, at Tyler, September 12th, 1890. E. P. Smith, clerk.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above matter on this page contains a correct copy of the motion of P. Walton, clerk, at Austin, for leave to enter order and judgment on motion for rehearing *nunc*

pro tunc in the case of J. W. Davis *v.* The State of Texas, in said court of appeals, on file in my office.

Seal Court of Appeals, of Texas.

Given under my hand and official seal, at Tyler, this 2nd day of January, 1891.

E. P. SMITH.

219 *Order on Motion for Leave to Enter Order and Judgment Nunc pro Tunc. October* 8, 1890.

J. W. DAVIS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

930, 3329. Appeal from Tarrant County. October 8, 1890.

This day came on to be heard the motion in writing of the State filed herein, asking that a judgment *nunc pro tunc* be entered herein upon the minutes of this court, and the appellant being represented in court by attorney, and the court, having heard the motion and being satisfied that the statements therein are true, is of the opinion that said motion should be granted. It is therefore considered, ordered, and adjudged by the court that the following judgment, which was rendered herein on the 4th day of June, A. D. 1890, by this court, but which was not then fully entered upon the minutes of this court through inadvertence of the clerk, be now entered upon the minutes of this court as of said last date, to wit, June 4th, A. D. 1890.

J. W. DAVIS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

3329, 6866. Appeal from Tarrant County. Opinion on Motion for Rehearing Delivered by J. M. Hurt, Judge.

This cause came on to be heard on the motion submitted by appellant for a rehearing, and the same, being duly considered of by the court, is overruled and refused.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above matter on this page is a true and correct copy of the order and judgment of the court of appeals of Texas entered on the motion for leave to enter a judgment *nunc pro tunc* on the 8th day of October, 1890, at Tyler, as from the records of my office is manifest.

Seal Court of Appeals of Texas.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

220 *Agreement. Filed October 6th,* 1890.

In the Supreme Court of the United States.

J. W. DAVIS, Pl'ff in Error,
vs.
THE STATE OF TEXAS, Def't in Error. } On Writ of Error to the Court of Appeals of Texas.

Agreement of parties.

Whereas in the above cause, in the court of appeals of the State of Texas, said cause being numbered 3329 and styled J. W. Davis *vs.* The State of Texas on the docket of the court of appeals of the State of Texas, the clerk of the court of appeals of said State, through inadvertence, failed to enter up the final judgment of the court overruling the appellant's motion for rehearing in said cause; and whereas a motion is now pending in said court of appeals, brought by the State of Texas, to enter said judgment *nunc pro tunc* at the present term of the court of appeals; and whereas it will be impracticable after the entry of said judgment *nunc pro tunc* to finish the record in said cause in time to file the same in the Supreme Court of the United States by the first day of the next term of said Supreme Court, it is therefore hereby agreed by the parties to said cause, to wit: That said final judgment be here now entered *nunc pro tunc*, and that the time for filing said transcript of the record of said cause in the Supreme Court of the United States be extended so that said transcript may be filed during the first sixty days of the term of said Supreme Court which begins on the second Monday in October, 1890.

Witness our hands this October 6, 1890.

W. L. DAVIDSON,
Ass't Att'y Gen'l, for The State of Texas, Def't in Error.
BYRON G. JOHNSON,
Attorney for J. W. Davis, Pl'ff in Error.
J. S. HOGG,
Att'y Gen'l of Texas.

Endorsements: No. 3329. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. In Supreme Court of the United States, from court of appeals of Texas. Agreement of parties. Filed in court of appeals, at Tyler, Oct. 6, 1890. E. P. Smith, clerk.

221 I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing page (220) contains a true and correct copy of an agreement filed in the cause of J. W. Davis *v.* The State of Texas, in our said court of appeals, on the 6th day of October, 1890, as from the records of my office is manifest.

To certify which I hereunto sign my name and affix the seal of

said supreme court, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Petition for Wr-t of Error. Filed December 20, 1890.

Petition for writ of error to the Supreme Court of the United States.

J. W. DAVIS
v.
THE STATE OF TEXAS.

To the Hon. John P. White, presiding judge of the court of appeals of the State of Texas:

Comes now J. W. Davis, the petitioner in the above cause, and presents to your honor that he is a citizen of the United States and of the State of Texas, and as such is entitled to the full protection of the laws and Constitution of the United States; that the Hon. R. E. Beckham is the judge of the State district court of and for the district of Tarrant county, Texas, which district is known as the seventeenth judicial district of the State of Texas, and that said district court has jurisdiction of all criminal causes of the grade of felony to try said causes originally upon the law and the evidence, and that the highest court in the State of Texas having appellate jurisdiction in said grade of offenses is the court of appeals of the State of Texas, and that the Hon. John P. White, to whom this petition is presented, is the presiding judge of said court of appeals, the Hon. Sam. A. Willson and the Hon. J. M. Hurt being the associate judges of said court of appeals; that heretofore, on the 10th day of September, 1889, in said district court, twelve men, purporting to constitute the grand jury of said county, presented and filed in said district court an instrument in the form and style of a bill of indictment, charging your petitioner with the offense of murder,
222 said offense being designated as felony by article 609 of what is known as the Penal Code of the State of Texas, said cause being styled and numbered in said State district court as follows: "No. 5563, The State of Texas *vs.* J. W. Davis," and said cause being No. 3329 and styled J. W. Davis *vs.* The State of Texas on the docket of the court of appeals of the State of Texas; that said pretended bill of indictment avers, after stating the date and venue, that the defendant, your petitioner, "did, with his express malice aforethought, kill and murder one B. C. Evans by shooting him with a pistol;" and that said indictment does not aver that petitioner did shoot said B. C. Evans with a pistol, and thereby fails to aver directly the doing of any act by the defendant which did result in the death of said Evans, or any act calculated to produce the death of said Evans, or any deliberation or premeditation on the part of your petitioner; that said indictment failing to charge the defendant with the commission of any act with deliberation or pre-

meditation resulting in the death of said B. C. Evans, said indictment charges no offense at all, and is therefore null and void and is not an indictment for murder. Wherefore, your petitioner says that he has been convicted of felony, with the death penalty attached, without having first been indicted by a grand jury, which is contrary to article 5 of the Constitution of the United States, which declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;" that on the trial of said cause in said district court on the 11th day of October, 1889, twelve men, who had heretofore, during said trial, been impanelled and sworn as a petit jury by said State district court to try said cause, returned and filed in said court a verdict convicting said defendant of the offense of murder in the first degree and fixing his punishment at death, upon which verdict judgment was entered accordingly by said State district court; that within the time prescribed by the laws of the State of Texas your petitioner perfected and entered his appeal from said judgment to said court of appeals of the State of Texas, sitting in the city of Tyler, and that said appeal was, within proper time thereafter, duly filed and docketed, together with a complete transcript of the record of said cause from said district court in the State court of appeals, at Tyler; that thereafter, at a regular term of our said court of appeals, at Tyler, to wit, on the 12th day of December, 1889, upon the hearing of said appeal, our said court of appeals therein rendered judgment affirming said judgment of the said State district court; that immediately thereafter, and within the time prescribed by the laws of the State of Texas, your petitioner, believing
223 both said judgment of said State court and the proceedings in said court had, as well as said judgment of affirmance by the court of appeals, to be erroneous and void, as contrary to the sections of the Constitution of the United States hereinafter designated, filed and duly entered and had docketed in said court of appeals his motion for rehearing in said cause, and that upon hearing of said motion the record in said cause was sent to the branch of the court of appeals held at Tyler, where the judgment overruling said motion was entered *nunc pro tunc* and made of record as the judgment overruling the motion for rehearing in said cause on the 8th day of October, 1890, by which said judgment was made final in said State courts. Your petitioner further says that if said judgment is carried into execution your petitioner will be deprived of his life and suffer death, by being hanged, without due process of law and in violation of section 1 of the fourteenth amendment to the Constitution of the United States, which provides that "no State shall deprive any person of life, liberty, or property without due process of law," because he says that articles 605, 606, and 609 of the Penal Code of the State of Texas, defining and prescribing the punishment for murder, are null and void and are not statutes nor law, because neither of said articles of the Penal Code have ever been passed or enacted into a law by either house of the Legislature of the State of Texas, nor by the Congress of the United States, nor by any other legislative power, and that a conviction under said void

articles is contrary to section 4 of article 4 of the Constitution of the United States, which provides that "the United States shall guarantee to every State in this Union a republican form of government," which contemplates the enactment of laws by the people through their properly constituted legislative bodies and not the making or promulgation of a statute by any one man without the will or consent of the people. Petitioner further states that there is no other law in force in the State of Texas authorizing or providing for the trial or punishment of any person for the offense of murder, and that said articles referred to are not law, but are null and void. Your petitioner further says that article 607 of the Penal Code of the State of Texas, which is a valid and subsisting law of the said State, reads as follows: "Article 607. If the jury shall find any person guilty of murder they shall also find by their verdict whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder a jury shall be summoned to find of what degree of murder he is guilty;" that said statute was a valid law, in full force and effect at the time of the commission of the homicide charged in this cause and at the time of
224 the trial of said cause in said State district court, and is mandatory in its requirements that the jury, and not the judge, shall pass upon the two degrees of murder; notwithstanding which said State district judge, on the trial of your petitioner in said State district court, in effect repealed said statute, and then and there made in writing and read in charge to the jury a different rule or law, commanding said jury not to allow your petitioner the protection of said statute, and not to find whether your petitioner was guilty of the second degree of murder, but that said jury should only consider and find as to first degree, and not as to the second degree, said judge then and there enforcing said rule in writing as a new law in said cause, taking the place of said article 607 of the Penal Code and repealing the same for the purposes of said trial of your petitioner, which said law or rule so promulgated and enforced by said State district judge was in the nature of an *ex post facto* law, and also denied to your petitioner the equal protection of the law set forth in said article 607 of the Penal Code, said judge being an officer of the State of Texas; all of which unlawful procedure is contrary to the last clause of section 1 of the fourteenth amendment to the Constitution of the United States, which provides: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws;" that said promulgation or enforcement of said rule in writing was therein by said judge stated to be the law, and thereby it repealed and took the place of said statute; all of which is in direct violation of section 1, article 9, of the Constitution of the United States, which forbids the making of *ex post facto* laws; that all of said questions and matters herein complained of were involved and drawn in question in the trial of said cause, both in the State district court and in the court of appeals, and were by each of said courts decided against your petitioner. Your petitioner further says that on the trial of this cause in the State district court your petitioner presented his sworn application

for a continuance of the case to the next term of that court, in order to procure the presence and testimony of two witnesses in his behalf, and set forth in said application the names and residence of said witnesses, and showed in said application that both of said witnesses then resided in Tarrant county, Texas, within the jurisdiction of said State district court, and that he was at that time using compulsory process of the law to compel the attendance of said witnesses at said trial to testify in his behalf, and by setting out the evidence expected of said absent witness- showed in said application that said expected evidence was material and of the highest importance to
225 the defense of said cause, and that all legal diligence had been exercised by the defense to compel the attendance of said witnesses to testify at said trial. Petitioner further says that on hearing said application for continuance said State district judge decided that the testimony of the absent witnesses, as set out in said application for continuance, was not probably true, and that petitioner had not the right to submit said evidence to the jury, and that he had not the right to a trial by jury as to his witnesses and their evidence, but that the cause should be tried by a jury as to the State's side of the case and as to the State's witnesses and evidence, but that the defendant had not the same right as the State, and that the credibility of the defendant's witnesses and the truth of their testimony should be decided by the judge without a jury; whereupon said State district judge, in the absence of defendant's witnesses, decided that they were not credible witnesses and that their testimony set out in the motion for continuance was not probably true, and therefore overruled said motion for continuance and tried petitioner in the absence of his witnesses; to all of which rulings said defendant, your petitioner, reserved his exceptions. Petitioner further says that the State court of appeals in deciding this cause sustained the rulings of said State district court as to said motion for continuance, and that said decision of the court of appeals is contrary to article 6 of the amendments to the Constitution of the United States, which reads as follows: "In all criminal prosecutions the accused shall enjoy the right to a speedy public trial by an impartial jury, to be confronted by the witnesses against him, and to have compulsory process for obtaining witnesses in his favor;" that said decision violates said article of the Constitution by denying the prisoner the right of trial by jury and of having his witnesses and evidence in court by compulsory process, and by allowing said State district judge to pass upon the truth of the witnesses' evidence in the absence of the jury and without allowing the prisoner the right to examine his witnesses upon oath that the jury might pass upon their credibility and the truth of their evidence, the prisoner having the same right to a trial by jury as had the State under the laws and Constitution of the United States. Petitioner further says that the decision of the State court of appeals sustaining the rulings of the State district court in denying the prisoner's right to have his evidence in court and his right to have the credibility of his witnessess and the truth of their evidence decided by the jury and not

by the judge alone was based upon article 560 of the Code of Criminal Procedure of the State of Texas, which provides that a motion for continuance made by defendant in a criminal trial shall not be granted as a matter of right, but that in case of conviction, if it appears
226 to the judge from the evidence adduced on the trial that the evidence of the absent witnesses named in the motion for continuance was material and probably true, a new trial should be granted, which said statute purports to give the judge the power to divide the trial into two parts, trying the State's side by the jury and the defendant's side by the judge in advance of and independent of the jury, which said statute is contrary to article 6 of the amendments to the Constitution of the United States, which is quoted above in this petition, because it allows the judge to deprive the prisoner of his right to have his evidence in court by compulsory process; because it gives the judge the right to deprive the prisoner of his right to have the truth or falsity of the evidence in his favor decided by the jury and not by the judge, and because it allows the State the right of trial by jury as to its evidence and denies the same right to the prisoner as to his evidence, leaving the judge to decide the prisoner's evidence and the jury to decide the State's evidence. Your petitioner further presents that since the affirmance of the judgment in this case the mandate of the court of appeals has been issued and sent down to said State district court, and that your petitioner will be executed and suffer death under the requirements of said mandate before this cause can be decided in the Supreme Court of the United States unless said proceeding is stayed by supersedeas. Your petitioner further states that all of said matters and questions herein complained of were involved and drawn in question in the trial of said cause, both in the State district court and in the court of appeals, and were by each of said courts decided against your petitioner, and that a decision of said questions *were* necessary to a decision of said cause; all of which is fully shown by the record of said cause, which is here submitted for the inspection of your honor, said record remaining in the custody of E. P. Smith, the clerk of the court of appeals, at Tyler, Texas, and that your petitioner is now, in accordance with the laws of the State of Texas, confined in the jail of Tarrant county, Texas, in the custody of J. C. Richardson, the sheriff of said county, to await the final decision of this cause. Wherefore your petitioner prays that he be allowed a writ of error to the Supreme Court of the United States in said cause, that said matters may be reviewed and said errors be corrected by said Supreme Court of the United States, and that a writ of supersedeas be issued to the sheriff of Tarrant county staying all further proceedings under said judgment and mandate until said cause can be decided by the Supreme Court of the
227 United States, as provided by section 1040, Revised Statutes of the United States.

Respectfully submitted.

BYRON G. JOHNSON,
Attorney for Petitioner, J. W. Davis.

Oct. 13th, 1890.

Allowed.

JOHN P. WHITE,
Presiding Judge of the Court of Appeals of Texas.

[SEAL.] W. M. REED,
Clerk U. S. Circuit —, Eastern District of Texas, at Tyler.

Endorsements: No. 6866, 3329. In the Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Petition for writ of error. Filed in court of appeals, at Tyler, Dec. 20, 1890. E. P. Smith, clerk.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above and foregoing, from the middle of page 221 to the last line above on this page, contains a true and correct copy of the original petition for writ of error, filed in my office on the 20th day of December, 1890, in the cause of J. W. Davis *vs.* The State of Texas, as from the records of my office is manifest.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, A. D. 1891.

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Writ of Error. Filed December 20, 1890.

The President of the United States to the honorable judges of the court of appeals of the State of Texas, holding session at Tyler, in said State, Greeting:

228 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said State court of appeals, before you, said cause being No. 3329 in said court of appeals, between J. W. Davis, who is appellant, and The State of Texas, who is appellee, in said numbered cause on the docket of your said court of appeals of the State of Texas, sitting at Tyler, in said State, wherein was drawn in question the validity of a statute of the State of Texas and an authority exercised under the statutes of said State on the ground of their being repugnant to the Constitution and laws of the United States and your decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and your decision was against the right and privilege specially set up and claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said J. W. Davis, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together

with this writ, so that you have the same at Washington on the fourth Monday of October, 1890, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the — day of October, in the year of our Lord one thousand eight hundred and ninety, and the seal of the circuit court of the United States, at Tyler, in the 114th year of the Independence of the United States.

W. M. REED,

[SEAL.] *Clerk of the Circuit Court of the United States, Eastern District of Texas, at Tyler.*

Allowed.

JOHN P. WHITE,

Presiding Judge of the Court of Appeals of Texas.

This October 13th, 1890.

Endorsements: No. 6866, 3329. In the Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Writ of error. Filed in court of appeals, at Tyler, Dec. 20, 1890. E. P. Smith, clerk.

229 I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing page (228) and the three last lines on page 227 contain a true and correct copy of the writ of error filed in my office on the 20th day of December, 1890, in the cause pending in said court of appeals, of J. W. Davis *v.* The State of Texas, as from the records of my office is manifest.

Seal Court of Appeals, State of Texas.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

E. P. SMITH,

Clerk Court of Appeals of Texas, at Tyler.

Citation in Error. Filed December 20, 1890.

UNITED STATES OF AMERICA:

To the State of Texas and L. S. Ross, Governor, and J. S. Hogg, attorney general, of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Texas, sitting at Tyler, wherein J. W. Davis is plaintiff and The State of Texas is defendant in error, to show cause, if any there be, why the judgment in said

writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 31st day of July, in the year of our Lord one thousand eight hundred and ninety.

JOHN P. WHITE,
Presiding Judge, Court of Appeals of Texas.

Test with the seal of court, at Austin, this 31st day of July, A. D. 1890.

[SEAL.]

D. H. HART,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin,
By GEO. F. JERNIGAN, *Deputy.*

Endorsements: 6866, 3329. In the Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, 230 def't in error. Citation in error. Issued 31st day of July, A. D. 1890. D. H Hart, clerk of the circuit court of the United States, west. dist. of Texas, at Austin, by Geo. F. Jernigan, deputy. Filed in court of appeals, at Tyler, Dec. 20, 1890. E. P. Smith, clerk. Austin, Texas, Sept. 11th, 1890. I hereby accept service of the within citation, waive copy and service of further process. J. S. Hogg, att'y general of Texas.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above and foregoing two-thirds of the preceding page (229) and six lines on this page contain a true and correct copy of the original citation in error issued on July 31, 1890, and filed in my office on the 20th day of December, 1890, in the cause of J. W. Davis *v.* The State of Texas, as from the records of my office is manifest.

Seal Court of Appeals of Texas.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, 1891.

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Citation in Error. Filed December 20, 1890.

UNITED STATES OF AMERICA:

To the State of Texas and L. S. Ross, Governor, and J. S. Hogg, attorney general, of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth Monday of October, 1890, pursuant to a writ of error filed in the clerk's office of the court of appeals of Texas, sitting at Tyler, wherein J. W. Davis is plaintiff and you, The State of Texas, *is* defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of
231 the said Supreme Court of the United States, this 13th day of October, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] JOHN P. WHITE,
Presiding Judge of the Court of Appeals of Texas.

Test with seal of court, at Tyler, this 13th day of October, A. D. 1890.

W. M. REED,
[SEAL.] *Clerk U. S. Circuit Court, Eastern Dist. Texas, at Tyler.*

Endorsements: 6866, 3329. In the Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Citation in error. Filed in court of appeals, at Tyler, Dec. 20, 1890. E. P. Smith, clerk.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing, from the middle of the preceding page (230) to the last line above on this page, contains a true and correct copy of the original citation in error issued Oct. 13, 1890, and filed in my office on the 20th day of December, 1890, as from the records of my office is manifest.

Seal Court of Appeals of Texas.

Given under my hand and seal of said court of appeals, at my office, in the city of Tyler, on this the 2nd day of January, A. D. 1891.

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Affidavit of Inability to Pay Costs. *Filed December* 20, 1890.

J. W. DAVIS, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.
} On Error to the Supreme Court of the United States from the Court of Appeals of the State of Texas.

THE STATE OF TEXAS, *County of Tarrant,* } *ss:*

Whereas in the above cause, as it is styled in the Supreme Court of the United States, said cause being numbered 3329 and
232 styled J. W. Davis *vs.* The State of Texas, on the docket of the court of appeals, at Tyler, in said State, said J. W. Davis being appellant and The State of Texas being appellee in said cause in the court of appeals of the State of Texas, the said J. W. Davis has sued out a writ of error in said cause to the Supreme Court of the United States; and whereas the said J. W. Davis is unable to comply with the rules as to paying and giving security for the costs of said proceeding: Now, therefore, before me, the undersigned authority, this day personally appeared said J. W. Davis, who, being by

me duly sworn, deposes and says that he owns no money, property, or effects of value of any kind whatever, and that he has none, and that he is too poor to pay any part of the costs of this proceeding or of preparing the record therein, and that he is unable to give security for said costs or for any part thereof, and prays that he be not denied his right to said proceeding on account of his said poverty and inability to pay said costs or to give security therefor.

J. W. DAVIS,
Plaintiff in Error.

Subscribed and sworn to before me, at my office, in Tarrant county, Texas, this October 6th, 1890.

[SEAL.] A. G. McCLUNG,
J. P. and ex Officio Notary Public in and for Tarrant County, Texas.

Endorsements: No-. 6866, 3329. J. W. Davis *vs.* The State of Texas. Affidavit of inability to give security for costs. Filed in court of appeals, at Tyler, Dec. 20, 1890. E. P. Smith, clerk.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the above and foregoing seven lines on the preceding page (231) and all above this certificate on this page contain a true and correct copy of the original affidavit of J. W. Davis to the effect that he is unable to pay or give security for costs, filed in the cause of J. W. Davis *vs.* The State of Texas, in the said court of appeals of Texas, as from the records of my office is manifest.

Given under my hand and seal of said court of appeals of Texas, at my office, in the city of Tyler, on this the 2nd day of January, A. D. 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

233 UNITED STATES OF AMERICA:

To the State of Texas and L. S. Ross, Governor, and J. S. Hogg, attorney general, of Texas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the fourth Monday of October, 1890, pursuant to a writ of error filed in the clerk's office of the court of appeals of Texas, sitting at Tyler, wherein J. W. Davis is plaintiff and The State of Texas is defendant in error, to show cause, if any there be, why the judgment *of* the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 13th day of October, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] JOHN P. WHITE,
Presiding Judge of the Court of Appeals of Texas.

Test with seal of court, at Tyler, this 13th day of October, A. D. 1890.

[SEAL.] W. M. REED,
Clerk U. S. Circuit Court, Eastern Dist. of Texas, at Tyler.

Endorsements: In the Supreme Court of the United States. J. W. Davis, pl'ff in error, *vs.* The State of Texas, def't in error. Citation in error. Issued 13 day of October, A. D. 1890. Filed in court of appeals, at Tyler, on the 2nd day of January, 1891. E. P. Smith, clerk.

THE STATE OF TEXAS, }
County of Travis. }

I hereby waive service of the within citation and the second writ of error herein issued and accept service of same in behalf of the State of Texas, the defendant in error in said cause.

J. S. HOGG,
Attorney General of Texas, Attorney for State of Texas, Defendant in Error.

I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing matter contained on this page contains a true and correct copy of the citation in error and all endorsements thereon, filed in my office on the 2nd day of January, 1891, in the cause of J. W. Davis *vs.* The State of Texas, as from the records of my office is manifest.

234 Seal Court of Appeals of Texas.

Given under my hand and seal of said court of appeals of the State of Texas, at my office, in the city of Tyler, on this the 2nd day of January, A. D. 1891.

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

235 I, E. P. Smith, clerk of the court of appeals of the State of Texas, at Tyler, do hereby certify that the foregoing two hundred and thirty-four (234) pages contain a true and correct copy and transcript of all the proceedings had in our said court of appeals in the cause of J. W. Davis, appellant, *vs.* The State of Texas, appellee, the first 128 pages being a correct copy of the transcript from the State district court to said court of appeals on appeal, the balance, beginning with page 130, containing a true and correct copy of the proceedings of our said court of appeals proper, including State's motion for certiorari, answer to motion for certiorari, order submitting cause, judgment, opinion, appellant's motion for rehearing, State's reply to motion for rehearing, order transferring motion for rehearing to Galveston, order transferring motion for rehearing to Austin, order overruling motion for rehearing, opinion on motion for rehearing, petition for writ of error, filed Aug. 4, '90; writ of error and supersedeas, filed Aug. 4, '90; copy of writ of error and service of supersedeas, filed Aug. 4, '90; assignment of errors, mo-

tion to enter judgment on motion for rehearing *nunc pro tunc*, order on motion to enter judgment *nunc pro tunc*, agreement of parties, petition for writ of error, filed Dec. 20, '90; writ of error, filed Dec. 20, '90; citation in error, dated July 31, '90; citation in error, dated Oct. 13, '90; affidavit of inability to pay costs or to give bond therefor, and citation in error, filed January 2, '91; and I do further certify that I have attached hereto, just preceding page 1, the original writs of error, three in number, and the original citations in error, three in number, filed in my office in said cause, and that I have retained in my office correct copies of said writs of error and citations in error, all of which from the records of my office is manifest.

Given under my hand and seal of said court of appeals of the State of Texas, at my office, in the city of Tyler, on this the 2nd day of January, A. D. 1891.

[Seal Court of Appeals of Texas.]

E. P. SMITH,
Clerk Court of Appeals of Texas, at Tyler.

Endorsed on cover: Texas court of appeals. No. 1593. J. W. Davis, plaintiff in error, *vs.* The State of Texas. Filed January 22nd, 1891.

FILED
MAR 30 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1593.

J. W. DAVIS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

Brief for Davis upon the Motions to Dismiss, or Affirm, or Advance.

S. F. PHILLIPS,
F. D. MCKENNEY,
For the Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1593.

J. W. DAVIS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

Brief for Davis upon the Motions to Dismiss, or Affirm, or Advance.

The plaintiff in error is charged with the murder of B. C. Evans, upon the 6th of July, 1889. The indictment was found (folio 2) on the 10th of September thereafter, and upon the 11th of October he was tried, and on the morning of the 12th was found guilty of murder in the first degree. (Folio 3.) Judgment accordingly.

The statement of facts made up for the use of the Court of Appeals presents the evidence somewhat at large. But of this it is necessary at present to give only that of the defendant himself, who was sworn in his own behalf and testified as follows:

"I have been a resident of Fort Worth about six years the last time, I think. During that time I have been with the B. C. Evans Co. about six years, employed in the clothing department.

Q. Will you just relate to the court and jury——

A. Well, I suppose it was between nine and ten o'clock. Mr. Evans came down in the store and commenced talking with me; asked me how the stock was and a good many questions, and then he says, 'Mr. Davis, I don't think I will need your services any longer than the 15th;' and he says, 'This is not all;' he says, 'I have it from the very best information that you have been too intimate with a lady here in the house.' I says, 'Mr. Evans, what lady was that?' and he says, 'It is enough for you to know that you quit on the 15th,' and walked off. That was I suppose between nine and ten o'clock. He went off and I commenced waiting upon a customer, and I did not see Mr. Evans any more until afternoon. Well, I went on up to my usual dinner hour, which is 11.30. I usually go at that time, but for some cause or other Frank Lawson wanted to exchange, and he went at twelve o'clock and I went at one, and coming back to the store I walked up and down the aisles several times, and King asked me, he says, 'Judge'—that is the nickname they called me for a long while,—he says, 'what is the matter with you?' and I told him that I was mad, and did not tell him at first. I don't believe I gave him any answer when he first asked me, and I says, 'Terry, there is some one in the house been slandering me, and I will give him the mischief if I find out who it is.' Thereupon I walked off. We didn't talk but just a few minutes. I didn't see Mr. Evans from about 9.30, somewhere along there, until I got my dinner. I saw him in the afternoon after dinner. I think the first time I saw him was behind the dress goods counter talking with some one, I forget who now, and I passed on down, passed by the counter two or three times, and walked in the carpet-room two or three times, and when I saw him there I

asked him—I says, 'Mr. Evans, I think I have a right to know what lady you have reference to, sir.' He says, 'Davis, you know well enough who I have reference to,' and he says, 'Mrs. Randall and Miss Rafferty are no better.' I says, 'Mr. Evans, if you make that accusation you are a liar,' and he told me, 'You are a God damn liar;' then he raised up, advanced towards me, threw his hand to one side as if to draw a pistol, and I commenced shooting.

Q. What other ladies were in that establishment besides the ladies you have mentioned?

A. Mrs. Gracey. Mrs. Gracey and I were engaged at that time—engaged to be married—and have been for a good long while. I think she has been in that house possibly about three years.

Cross-examined:

I expect she is still there. Last accounts, I think she was.

Redirect examination:

I have never mentioned a word of this to her. I have not seen her. I have never opened my mouth before this about this."

The instructions given by the Judge to the jury are upon folio 33, etc.

One ground for new trial for which the defendant moved on the 30th of October, 1889 (in lieu of a previous motion of the same sort made upon the 14th and not appearing upon the record) is:

"19. Because also that the court erred in failing to instruct the jury upon the law of murder in the second degree as applicable to the issues legitimately deducible from the evidence and theory of the defence in this case." (Folio 63.)

The nineteenth assignment of error before the Court of Appeals was as follows:

"The testimony of the witnesses Terry King (folio 7) and of the defendant Davis, and of the witness G. L. Harris demanded a charge upon the law of murder in the second degree, and the omission of the court to charge upon murder in the second degree, is here assigned as error." (Folio 122.)

The Court of Appeals affirmed the judgment below; and in its opinion said, in regard to the point above presented:

"The learned judge submitted the question of self-defence, but did not submit to the jury but one degree of murder, viz., the first. There was no objection to the charge for this omission, nor did counsel request an instruction upon the second degree. We have reversed a great number of judgments in all manner of felony cases for this omission, though there was no charge requested, no objection taken because of the omission to charge the law applicable to the different stages of the case. But in the absence of requested charges, or objection, what is the rule? We are discussing the matter upon the hypothesis that murder of the second degree is presented by some evidence in the record. The rule is stated in Bishop *v.* The State, 43 Tex., 390, to be that if the charge is erroneous and is excepted to at the time the judgment will be reversed, but though erroneous if not excepted to or proper instructions requested the judgment for this error may or may not be reversed. If the omission of a material error, calculated to injure the rights of the defendant, though the error is called to the attention of the Court first in a motion for a new trial, the judgment should be reversed, but in determining whether the error is material and calculated to injure the rights of the accused we are to look to the whole record bearing upon the subject. What was the nature of the testimony supporting the verdict?

Was it cogent and overwhelming? What was the character of the testimony presenting the phase or theory of the case omitted to be noticed in the charge and upon which error is assigned? Was it at all reasonable? Did it present a theory which a reasonable mind could entertain, or was it supported by such testimony as was remotely calculated to destroy the State's case? * * * It is possible that the jury may have believed that appellant's theory was true, and it is possible that they may not have believed that he provoked the difficulty or produced the occasion to have a pretext to slay the deceased, and it may have been possible that murder of the second degree would have been the verdict; but there was not the most remote probability that the jury would have done any of these things, and hence there is not the slightest possibilty that appellant was injured by the omission. Now, if counsel for appellant had objected to the charge of the court for the omission to charge a murder of the second degree, or had requested a charge upon that degree and it had been refused, there being some evidence to prevent this degree of homicide, we might have been required to reverse the judgment. This, however, is quite doubtful," &c., &c. (Folios 136–138.)

The question which it has been desired to bring before this COURT is, whether the record as above extracted presents a Federal question, i. e. a matter in which the plaintiff in error can complain that a right secured by the Constitution has been violated.

It is assumed as unnecessary that he should have claimed that right in the State Court *formally* as being "secured by the Constitution,"—in case he claimed the substance of the right at all. He need not have known that it was so "secured." If he asserted it substantially, it will now be enforced.

Without considering the testimony on the record other than as given above, it seems plain that wherever from fundamental principle a distinction exists betwixt the functions of *judge* and *jury* upon trials affecting *life*, it would have been entirely competent for a jury to accept the testimony given by the plaintiff in error as above, and rest their verdict upon that alone.

The point which the plaintiff in error desires to have argued before, and considered by, this Court is, Whether allowing, as is conceded by the learned court of appeals, that by the law of Texas persons who are upon trial in its tribunals for murder have a right to instruction by the Court calling the attention of the jury to the distinction betwixt the *first* and the *second* degrees of that crime, a court can ~~omit~~ ~~decline~~ to give such instructions upon the ground that although the evidence in the case before it is such as that the jury might therefrom legally decide that the offence is one of the *second* degree only, yet that in its opinion such evidence does not rise to a certain standard of credibility: In other words, that such court may exercise or omit as grave a function as the above occurring in the very heart of the case, by taking upon itself to pronounce in that connection,—*not* that there is really or virtually *no* evidence, but that the evidence is only of a certain minor degree of credibility,—without thereby depriving a person on trial of life without *due process*. (Constitution, art. 14)

The credibility of the evidence is not a question, directly or indirectly, *for the Court*.

In Calton *v.* Utah, 130 U. S., 83, an omission, not so evidently a violation of the trial rights of persons charged with murder, but nevertheless falling under like reason with the

present, was held by this COURT to be error. The present is of course not a case in which mere *error*, as distinguished from *undue process*, can be relied upon. But it is submitted that even the conclusion in Hurtado's case, 110 U. S., 516, leaves that class of questions to which the present belongs, matters of Federal interest at least in all States where upon fundamental principles a jury is the principal instrument of justice in matters of crime.

Admitting therefore that the present is a case fit to be advanced under the Rules, we suggest that it be heard at an early day after the opening of the next term of the COURT.

S. F. PHILLIPS,
F. D. MCKENNEY,
For the Plaintiff in Error.

Office Supreme Court U. S.
FILED,
MAR 3 1891
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1890.

No. 1593.

J. W. DAVIS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

Motion to Dismiss, Affirm or Advance.

BREIF FOR DEFENDANT IN ERROR.

C. A. CULBERSON,
Attorney-General of the State of Texas.
HENRY M. FURMAN,
CHARLES H. ARMES,
Of Counsel for the Defendant in Error.

The Law Reporter Print, 503 E.

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Supreme Court of the United States.

OCTOBER TERM 1890.

No. 1593.

J. W. DAVIS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

Motion to Dismiss, Affirm or Advance.

Now comes the State of Texas, by C. A. Culberson, its Attorney-General, and by Henry M. Furman and Charles H. Armes, of counsel for said State, and moves the court as follows:

1st. To dismiss the writ of error herein, because this court is without jurisdiction of the case.

2d. To affirm the judgment of the Court of Appeals of the State of Texas, because it is manifest that the writ of error was sued out for delay only.

3d. To advance the case for hearing, under Section 710, R. S. U. S., in the event of further argument being desired.

C. A. CULBERSON,
Attorney-General of the State of Texas.
HENRY M. FURMAN,
CHARLES H. ARMES,
For Defendant in Error.

To S. F. Phillips and F. D. McKenney, Esqrs., counsel for plaintiff in error:

Take notice that the above motions will be submitted to the Supreme Court of the United States, on Monday, the thirtieth day of March, 1891, or as soon thereafter as the court will entertain the motion.

C. A. CULBERSON,
Attorney-General of Texas.
HENRY M. FURMAN,
CHARLES H. ARMES,
For Defendant in Error.

WASHINGTON, D. C., *March 3*, 1891.

Statement of the Nature and History of the Case.

We deem it proper to state at the outset that, although this transcript is voluminous, yet there is but little in it that can be considered upon this motion, which will be shown by the following statement:

1st. On the 10th day of September, 1889, the Grand Jury of Tarrant County, Texas, returned an indictment against J. W. Davis for murder in the first degree. (Transcript, p. 7.) This indictment was not questioned or objected to, either in the trial court, or in the Court of Appeals of Texas, and is assailed for the first time in this court.

2d. When the case was reached in the trial court a motion was made to quash the special venire, summoned to try the case. (Trans., p. 81.) This motion did not raise any question involving the Constitution of the United States or any act of Congress. It was simply a technical motion based upon the local statutes and practice of Texas.

3d. A motion was made for a change of venue based upon statutory grounds alone. (Trans., p. 85.) This motion was

supported by the affidavit of three compurgators. It was impeached by a counter affidavit signed by nine citizens, all of whom are certified by the clerk of the court to be credible citizens. (Trans., p. 89.) Plaintiff placed twenty-seven witnesses on the stand to sustain his motion. A large majority of these witnesses, whose credibility and means of information were thus vouched for by plaintiff in error, testified that there was no such prejudice in Tarrant County as would prevent a fair trial. (Trans., p. 34.) Upon this showing the trial court overruled the motion for a change of venue and ordered the trial to proceed. (Trans., p. 45.)

4th. Plaintiff filed a motion for a continuance, on account of the absence of Dunk Grant and J. E. Solomon. (Trans., p. 91.) This motion upon its face shows, and does not attempt to excuse, an utter want of diligence upon the part of plaintiff. The subpœna for the alleged absent witnesses was not issued until the 23d day of September, thirteen days after the return of the indictment. The motion does not set up any defense under, nor call in question any clause of the Constitution of the United States or any law of Congress; but both in the trial court and in the Texas Court of Appeals this motion was urged on purely local statutory grounds. Exercising a discretion vested in him by the laws of Texas the trial court overruled this motion. (Trans., p. 93.) After the trial and conviction, when plaintiff in error was moving for a new trial, partly upon the ground of alleged error in overruling his said motion, the State, in reply to said motion, by authority of a statute of Texas, filed the affidavit of Dunk Grant to the effect that he was not present and did not witness the said homicide (Trans., p. 95), and the affidavit of S. M. Farmer showing that no such man as J. E. Soloman had ever lived in Tarrant County. Upon the trial of the case it was also proven on behalf of the State by W. R. McLowrey (Trans., p. 19), Sam. Farmer (Trans., p. 26), Henry Gates (Trans., p. 28), S. M. Smith (Trans., p. 30), and R. F. Step (Trans., p. 32),

that they were looking at the place where plaintiff claimed that his said alleged witnesses were standing at the time of the homicide, and that they were not there. The record on this question is so clear that the Court of Appeals of Texas in rendering its judgment, says, "an honest, conscientious man cannot read this record without concluding that appellant's version of this case was sheer fabrication." (Trans., p. 119.) So that no injustice was done plaintiff in error by overruling said motion.

5th. Every juror who sat upon the trial of the case was voluntarily accepted by appellant without objection or protest.

6th. The charge of the court was so clear and comprehensive (Trans., p. 33) that no additional instructions were asked by plaintiff in error, nor were exceptions taken to it. After conviction, in the motion for a new trial it was claimed that some additional instructions should have been given, and some alleged inaccuracies were complained of, but they were each and all based upon the statutes of Texas.

7th. Plaintiff filed a motion for a new trial, setting up twenty-nine alleged grounds therefor (Trans., p. 59), each and all of which were based upon purely technical objections to matters of practice which arose upon the trial, and all of which are regulated by the statutes of Texas. None of of these grounds refer in the most remote degree, or even hint at any defense involving a construction of any clause of the Constitution of the United States, or any law of Congress. No such issue was presented or decided by the trial court.

8th. The motion for a new trial was overruled. (Trans., p. 80.)

9th. The plaintiff in error filed an assignment of thirty-six alleged errors (Trans. p. 103), and the case was submitted upon them on oral argument and briefs for both parties. (Trans., p. 116.) These assignments of error followed the

motion for a new trial and are all based upon purely local statutes and matters of trial practice. None of these assignments invoke a construction of the Constitution of the United States or of any act of Congress. The opinion of the Court of Appeals is upon the evidence given on the trial of the case in the lower court, and upon the statutes of Texas alone. (Trans., p. 117.)

10th. Plaintiff in error filed a motion for rehearing, which is but a restatement of the original assignments of error and does not set up a single new ground for relief. (Trans., p. 120.)

11th. The opinion of the court refusing a new hearing is but a statement of the law of Texas as applicable to the facts. (Trans., p. 174.)

12th. At no time during the trial in the lower court or upon appeal to the Court of Appeals of Texas was any article of the Constitution of the United States or any law of Congress appealed to or made an issue. No such question was ever presented or passed upon by the Texas courts in the progress of this case. Such pretended questions are attempted to be raised for the first time in this court, by the petition for a writ of error.

Propositions under the above Statement and Motion to Dismiss or Affirm.

I.

The Supreme Court of the United States acts only upon the record of the court below, and of that record the petition for a writ of error forms no part.

Clark *vs.* Penn, 128 U. S., 395.
Manning *vs.* French, 133 U. S., 186.
Felix *vs.* Scharnweber, 125 U. S., 54.
Warfield *vs.* Chaffee, 91 U. S., 690.
Boom Co. *vs.* Boom Co., 110 U. S., 57.

II.

United States Courts are courts of limited jurisdiction and it devolves upon the party who invokes their aid to show that they have jurisdiction. The jurisdiction will not be presumed, but it must be affirmatively shown.

Ex parte Smith, 94 U. S., 456.
Scott *vs.* Sandford, 19 Howard, 402.
De Saussure *vs.* Gaillard, 127 U. S., 234.

III.

The right to be prosecuted under an indictment in a State Court is not guaranteed by the Constitution of the United States. Therefore the sufficiency of an indictment under the constitution and laws of a State is not a federal question.

Hertado *vs.* California, 110 U. S., 516.
Baldwin *vs.* Kansas, 124 U. S., 394.
Twitchell *v.* Com., 7 Wall., 321.
Caldwell *vs.* Texas, decided at present term of this court.

IV.

The Supreme Court of the United States has no authority to revise or construe a statute of a State upon any grounds of justice, policy or consistency to its own constitution, neither has it any power to pass upon objections to the formality or technicality of pleadings nor proceedings in the State courts. The questions as to whether the constitution or statutes of a State were complied with or not in proceedings on trial is not a Federal question. The only question with which this court can deal is whether the conviction and sentence founded on the statute are consistent with or in contravention of the Constitution of the United States or any law of Congress enacted in pursuance thereof.

Fox *vs.* Ohio, 5 Howard, 410.
Baldwin *vs.* Kansas, 129 U. S., 52.
Carpenter *vs.* Penn., 17 Howard, 462.

V.

The prohibitions contained in the Constitution of the United States were not designed as limitations upon the State governments, in reference to their own citizens. They are exclusively restrictions upon Federal power intended to prevent interference with the rights of the States and of the people.

Fox *vs.* Ohio, 5 Howard, 410.
Spies *vs.* Ill., 123 U. S., 166.
Twitchell *v.* Com., 7 Wall., 321.
Nashville *vs.* Alabama, 128 U. S., 96.

VI.

United States courts have no jurisdiction to annul, revise or change the decree of a State court of general jurisdiction, having complete control of the parties and subject matter.

Randall *vs.* Howard, 2 Black., 589.

VII.

A Federal question not raised and decided at the trial of a cause in the State court will not be considered.

Clark *vs.* Penn., 128 U. S., 397.
Campbell *vs.* Bradshaw, 128 U. S., 132.
Brooks *vs.* Missouri, 124 U. S., 394.
French *vs.* Hopkins, 124 U. S., 524.
San Francisco *vs.* Itsell, 133 U. S., 65.
Simmerman *vs.* Nebraska, 116 U. S., 54.
De Saussure *vs.* Gaillard, 127 U. S., 234.
Beaty *vs.* Benton, 135 U. S., 244.

It is, therefore, respectfully submitted that the writ of error should be dismissed for want of jurisdiction.

On Motion to Affirm.

If, however, this honorable court should be of opinion that it has jurisdiction, then it is submitted that the judg-

ment of the State court should be affirmed; for it is manifest that the conclusions of the State court were right and lawful and that the writ of error was brought for delay only, the obvious purpose being to defer as long as possible the execution of the judgment in the case.

This court has recently said that, in order to reverse the judgment of the highest court of a State, "we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States.

In re Kemmler, 136 U. S., 449.

ON MOTION TO ADVANCE.

It is further moved, that, under Section 710, R. S. U. S., this cause be advanced by order of the court, to be heard on a day to be fixed by the court, in the event that further argument is desired.

The purpose of this section appears to be to give such cases precedence over all others to be argued at the pending term, excepting only such cases as the court in its discretion may decide to be of public importance. The section reads as follows:

Section 710. Cases on writ of error, to revise the judgment of a State Court in any criminal case, shall have precedence, on the docket of the Supreme Court, of all cases to which the Government of the United States is not a party, excepting only such cases as the court, in its discretion, may decide to be of public importance.

Respectfully submitted,

C. A. CULBERSON,
Attorney-General of the State of Texas.
HENRY M. FURMAN,
CHARLES H. ARMES,
Of Counsel for the Defendant in Error.

Service of a copy of the within motions, notice and brief, accepted this 3d day of March, 1891.

PHILLIPS & McKENNEY.

March 3, 1891.